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Supreme Court of the United States

OCTOBER TERM, 1974

Nos. 73-1966 and 73-1971

UNITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION; AND ABERDEEN AND ROCKFISH RAILROAD CO., *et al.*,

Appellants

v.

STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES ("SCRAP"); ENVIRONMENTAL DEFENSE FUND, NATIONAL PARKS AND CONSERVATION ASSOCIATION AND IZAAK WALTON LEAGUE OF AMERICA ("EDF *et al.*"); INSTITUTE OF SCRAP IRON AND STEEL ("ISIS"); AND NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES ("NARI")

Appellees

On Appeal from the United States District Court for the District of Columbia

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BRIEF OF SCRAP, AND EDF *ET AL.*

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On Appeal from the United States District Court for the District of Columbia

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BRIEF OF SCRAP, AND EDF *ET AL.*

OPINIONS BELOW

The opinion of the three-judge district court (Gov.J.S. App. A, pp. 1a-56a) is reported at 371 F.Supp. 1291.

The Interstate Commerce Commission's opinion and order dated September 27, 1972, and served October 4, 1972, in *Ex Parte 281, Increased Freight Rates and Charges*, 1972 (Gov.J.S. App. D) is reported at 341 I.C.C. 290. The Commission's final environmental impact statement on *Ex Parte 281* (A.[1] 10-199) is reported at 346 I.C.C. 88. The Commission's order of May 2, 1973 (Gov.J.S. App. E) is not reported.

JURISDICTION

Jurisdiction is in dispute. Appellants allege jurisdiction under 28 U.S.C. § 1253. Appellees contest that allegation on the ground that this appeal is not from the grant or denial of an injunction, as required by § 1253, but rather from a judgment which both the lower court and the Government have characterized as "a declaration." 371 F. Supp. at 1295; Gov. Br., p. 12. See, *e.g.*, *Mitchell* v. *Donovan*, 398 U.S. 427, 430-31 (1970); *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 154 (1963).

QUESTIONS PRESENTED

1. Whether appellants are entitled, under 28 U.S.C. § 1253, to maintain a direct appeal which is not from the grant or denial of an "injunction," but rather from the grant of a "declaration" which expressly omits injunctive relief.

2. Whether general revenue orders of the Interstate Commerce Commission, issued pursuant to 49 U.S.C. § 15 (7), are immune from judicial review to determine whether the Commission has complied with relevant statutory procedural mandates.

3. Whether, in reviewing an environmental impact statement prepared pursuant to § 102(2)(C) of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332(2)(C), the reviewing court may determine the adequacy of the contents, as opposed to the mere form of the impact statement.

[1] References to "A" are to the Joint Appendix in this Court.

4. Whether the court below clearly erred in finding on the evidence before it that an environmental impact statement on a proposed percentage increase in rail freight rates was inadequate, where:

(a) Four of the five federal agencies which reviewed it in draft form pursuant to § 102(2)(C) of NEPA concluded that it contained insufficient information on the environmental impact of the proposed action to afford a basis for informed decisionmaking, and the fifth agency concluded that it inadequately considered "alternatives to the proposed action;" and

(b) The Commission did not attempt to cure the inadequacies asserted by these other agencies; and where

(c) Such impact statement failed to consider the effect of the proposed increase in perpetuating and increasing inequities in the existing rate structure, between primary and secondary materials.

5. Whether the court below clearly erred in finding that the oral hearings which the Interstate Commerce Commission customarily holds in its general revenue proceedings, conducted pursuant to 49 U.S.C. § 15(7), are part of the "existing agency review processes" for purposes of § 102(2)(C) of NEPA, so that an environmental impact statement must "accompany the proposal" for a general revenue order through such a hearing.

STATUTES INVOLVED

The following statutes are set out in the appendix, *infra*, pp. 1a-5a:

—28 U.S.C. § 1253;

—28 U.S.C. §§ 2321-25, as these sections stood prior to amendment on January 2, 1975, by P.L. 93-584;

—Public Law 93-584 (in pertinent part), amending 28 U.S.C. §§ 2321-25; and

—Section 102 of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332 (in pertinent part).

STATEMENT OF THE CASE

A. The Declaration Appealed From

This case is here on direct appeals, under 28 U.S.C. § 1253, from "a declaration" granted by a three-judge district court. See 371 F.Supp. at 1295; Gov.Br., p. 12. This declaration, now a year old, affects, at most, the burden of proof in hypothetical subsequent proceedings which may never be held. The lower court declared the invalidity of two orders entered by the Interstate Commerce Commission in *Ex Parte 281*, a general revenue proceeding,[2] and remanded the case to the Commission for reconsideration. The invalidated orders gave ICC approval to a round of increases in rail freight rates.[3]

But the lower court *did not enjoin collection of the increased rates*, which the Railroads have collected exactly

[2] The Commission's general revenue proceedings are conducted pursuant to § 15(7) of the Interstate Commerce Act, 49 U.S.C. § 15(7). A general revenue order "does no more than shift the burden of proof from the carrier to the shipper" in subsequent rate reparation proceedings, *if any*, under § 13(1) of the Act, 49 U.S.C. § 13(1). See Gov.Br., p. 5, n. 4. Invalidating such an order does no more than shift the burden of proof back to the carrier. Either effect is purely academic in the absence of a subsequent proceeding in which the burden of proof matters.

[3] The Commission's order of October 4, 1972, directly approved the rate increases. Its order of May 2, 1973, terminated *Ex Parte 281*.

as if the district court had never acted. Nor did the district court prevent the Commission from approving, or the Railroads from collecting, subsequent general rate increases, of which there have been three: *Ex parte 295* (1973), *Ex Parte 299* (1974), and *Ex Parte 305* (1974).[4]

As the lower court observed (371 F.Supp. at 1308, n. 50), and as no party has disputed:

> "The only consequence of our vacating the Commission's orders pending reconsideration of the rate increases 'is that the railroads may not rely, in some subsequent proceeding, on a Commission finding that the proposed rates were just and reasonable. In an action for reparations, for example, the railroads could not gain any benefit from the purported Commission approval of the increases.' Atchison, Topeka & Santa Fe R. Co. v. Wichita Board of Trade, . . . 412 U.S. [800] at 818. . . ."

The Railroads do not claim to have suffered pecuniary loss on this account in any such "subsequent proceeding." It does not even appear that such a "subsequent proceeding" has ever taken place, in the year since the lower court's judgment. In a practical sense the effect of the lower court's order on rates charged in the real world seems to have been nil.

The lower court declared the Commission's orders invalid on the ground that the Commission had failed, before entering them, to comply with § 102(2)(C) of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332(2)(C). Section 102(2)(C) requires, *inter alia*, that:

> "all agencies of the Federal Government shall— * * *
>
> "(C) include in every recommendation or report on proposals for . . . major Federal actions significantly

[4] None of these general revenue orders has yet been officially reported.

> affecting the quality of the human environment a detailed statement by the responsible official. . . ."

The "detailed statement" required by § 102(2)(C) must discuss the "environmental impact" of the proposed action, alternatives thereto, and certain other considerations.

The lower court declared that the impact statement prepared by the Commission in *Ex Parte 281* was inadequate to satisfy the Act. In so doing, the lower court relied in part on overwhelmingly negative appraisals made by five federal agencies with relevant environmental expertise, which reviewed the statement in draft form pursuant to the specific statutory requirement of § 102(2)(C).

The preponderant criticism of the impact statement made by these five reviewing agencies was that it contained so little "hard" information—as opposed to unsupported conclusions—about the environmental impact of the rate increases at issue in *Ex Parte 281* that it afforded no basis for informed decisionmaking. Thus the Environmental Protection Agency placed the draft statement in its lowest category, "Inadequate" (A. 707); the Department of the Interior commented that "the impact statement does not appear to us to meet the requirements of [NEPA] for providing a careful multidisciplinary examination of the environmental effect[s]" (A. 702); the Council on Environmental Quality commented that "deficiencie [pointed out earlier] have not been corrected," and that "the Commission has devoted little effort to analyzing alternative actions . . ." (A. 705); and the Department of Commerce commented that the draft "simply [gave] the Commission's judgment . . . without in-depth supporting documentation," that this was "insufficient," and that the Commission's discussion was internally inconsistent and marked by "circular reasoning." (A. 576-79).

The lower court also found that the Commission had not attempted to improve its analysis in light of these expert agency criticisms, or otherwise to respond to them, but that it had simply denounced the other agencies, and re-adopted almost verbatim as a final impact statement the text which they had found inadequate as a draft. 371 F. Supp. at 1302. The Commission's response, after receiving the comments of the reviewing agencies, had been simply to condemn as "one-dimensional" the views of

> "the governmental interests [which] together with the private environmental sector seek to demonstrate that this Commission should investigate environmental matters and effects more extensively with our own resources. It is such one-dimensional approaches as these that we are knowingly seeking to avoid." (A. 18).

Finally, the lower court found that the impact statement limited its "analysis to the marginal impact of the most recent rate increase with no discussion of whether the underlying rate structure itself significantly affects the environment," 371 F.Supp. at 1304, and thus failed altogether to address the contention, vigorously asserted by the Council on Environmental Quality and the Environmental Protection Agency, among others, that (in the CEQ's words):

> "across the board percentage freight rate increases widen existing differentials between virgin and secondary materials, thus reducing the level of recycling to a point below that which would have been obtained in the absence of a rate increase." (A. 567)[5]

The rate increases approved in *Ex Parte 281* averaged 4.1 percent on a wide variety of commodities, including

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[5] The Environmental Protection Agency determined that "there is evidence to indicate that the present rate structure discriminates against the movement of secondary materials." (A.708).

ferrous scrap being transported for recycling.[6] The Commission's impact statement concluded that none of the proposed rate increases would have a significant environmental effect, *i.e.*, that it would not affect the quantity of scrap shipped and recycled. At the same time, the Commission claimed that limiting the increase on nonferrous scrap to 3 percent (which it did) "will . . . have a beneficial effect on the environment. . . . [T]he holddown here imposed should encourage the movement and recycling of these commodities." (Gov.J.S., p. 60-d.)[7] The Environmental Protection Agency commented that these positions were mutually contradictory, "indicating that rate increases on secondary materials are arbitrary actions. . . ." (A. 574).

B. Background Facts

The present appeals are the most recent chapter in a long-protracted litigation through which appellees have sought to require a reluctant Commission to examine the environmental impact of the rail freight rate structure authorized by the Commission, and to prepare environmental impact statements, pursuant to § 102(2)(C) of NEPA, on the Commission's actions authorizing changes in that rate structure. Appellees have particularly sought to have the Commission deal, through the impact statement procedure, with the issue of whether freight rate increases approved on goods shipped for recycling can be reconciled with the Commission's specific mandate under § 101(b)(6) of NEPA, 42 U.S.C. § 4331(b)(6), to "enhance the quality of renewable resources and approach the maximum attainable recycling of depletable

[6] Commissioner Deason, dissenting in part, and Commissioner Brown, concurring in part, opposed any increases on recyclable materials. (Gov.J.S., pp. 87d-88d; *see also* A.237-38).

[7] Compare p. 11, *infra*.

resources," in view of evidence that the basic rate structure "discriminates against . . . secondary materials."[8] At the outset of this litigation, some two-and-one-half years after the effective date of NEPA, the Commission had filed exactly one impact statement pursuant to NEPA, and that only after it had been specifically ordered to do so by a court.[9] The Commission sought to justify its long-standing non-observance of the Act by including in "literally hundreds" of its regulatory orders a "negative statement or finding" that the action taken would have no significant environmental impact.[10] The court below determined that these routine "findings" were not based on "detailed study by the Commission," but were merely a "transparent . . . ruse", "no more than glorified boilerplate," and a "stratagem for avoiding the requirements of NEPA."[11]

Under the spur of this and other[12] litigation, the Commission has abandoned this "stratagem," at least for purposes of the present case. Thus the Commission no longer contests the need for environmental impact statements on its general revenue proceedings. The Commis-

[8] See note 5, *supra*, and accompanying text.

[9] See *SCRAP* v. *United States*, 346 F.Supp. 189, 195, n. 8 (D.D.C. 1972): "* * * The Commission assured us at oral argument that it had been following NEPA and issuing impact statements as a matter of course. However, in a subsequent communication to the court, the Commission conceded that in the 2 [and one-half] years since the effective date of NEPA it has issued only one impact statement, and that under judicial compulsion. *See* City of New York v. United States, E.D.N.Y., 337 F.Supp. 150 (1972)." The *City of New York* impact statement did not concern rates; at the outset of this litigation the Commission had *never* prepared an impact statement on any rate proceeding.

[10] *SCRAP* v. *United States*, *supra*, 346 F.Supp. at 200, n. 16.

[11] *Id.* at 200, n. 16, and at 201, n. 17 and accompanying text.

[12] See *Harlem Valley Transp. Ass'n* v. *Stafford*, 500 F.2d 328 (2d Cir. 1974) *aff'g* 360 F.Supp. 1057 (S.D.N.Y. 1973); *City of New York* v. *United States*, 337 F.Supp. 150 (E.D.N.Y. 1972).

sion does, though, bring to this Court its quarrel with the court below, with appellees, and with other federal agencies, as to the adequacy of the particular impact statement in issue here, and as to the need to prepare an impact statement *prior* to the oral hearing which the Commission customarily holds in a general revenue proceeding.

Similarly, the Commission has recently made belated progress in recognizing that the freight rate structure does have environmental consequences, and that, in the Commission's words, an across-the-board percentage increase in the rates has the effect of "perpetuat[ing] and increas[ing] any inequities that may exist in the rail rate structure between primary and secondary commodities." [13] In the environmental impact statement prepared in *Ex Parte 295*, a general revenue proceeding *subsequent* to the one in issue,[14] the Commission estimated that a 3 per cent rail freight increase on goods being shipped for recycling [15]—rather than having no significant environmental impact, as claimed in the Commission's previous boilerplate "findings," and in the *present* impact statement—would mean the following with respect to non-ferrous metals alone:

> "[A]n estimated [additional] 3,097 tons of metal will be annually required from virgin ores.[16] An

[13] See text at n. 19, *infra*.

[14] ICC, Final Environmental Impact Statement, *Ex Parte 295* (Sub-No. 1), Increased Freight Rates and Charges, 1973—Recyclable Materials (June 3, 1974) (lodged with the Clerk of this Court).

[15] As compared with the previous increase of up to 5 percent (3 percent on non-ferrous scrap) which is involved here (A. 55; *see* Gov. J.S., p.60d).

[16] The quantity of "virgin ores" required would appear to be greatly in excess of the quantity of "metal." For example, the Commission notes that "for every ton of copper recovered from United States ores of 0.55% content, nearly 200 tons of waste must be disposed." *Ex Parte 295* Impact Statement, p. 2-13.

> increased yearly power consumption of 21.8 million kilowatt hours can be expected, with an increase in pollutant emissions of about 15 tons per year." [17]

With respect to iron and steel scrap, the Commission estimated in *Ex Parte 295* that a rail freight increase of *3 percent* on scrap being transported for recycling will result in:

> "an expected annual decrease in recycled scrap of . . . 67,000 tons . . . , resulting in additional mining requirements for 156,000 tons of domestic ore, 58,-300 tons of coal and 14,700 tons of limestone and dolomite. The processing of additional ore is expected to require an increase of 324 thousand megawatt hours; increased pollutants emitted are estimated as 4,500 tons (on a controlled basis)." [18]

[17] *Ex Parte 295* Impact Statement at xiii-xiv. See discussion in n. 18 *infra*.

[18] *Ex Parte 295* Impact Statement, *supra*, at p. xiv. To put these figures on power consumption in perspective, the average American residential customer (*i.e.*, the average *household*, not the average *individual*) used 8,079 *kilowatt* hours in 1973 (Edison Electric Institute, *Statistical Yearbook of the Electric Utility Industry for 1973*, p. 2); thus 345,800 *megawatt* hours (adding the ICC's figures for increased consumption attributable to rate increases on both ferrous and non-ferrous *metal* scrap) would provide for the electrical consumption of approximately 43,000 American households. In 1973, assuming the use of fossil fuels, 10,429 BTUs were required to generate one kilowatt hour. (*Statistical Yearbook*, *supra*, p. 41, Table 41-S.) A barrel of oil provides 5,800,000 BTUs (Energy Policy Project of the Ford Foundation, *A Time to Choose, America's Energy Future*, p. 5. n. a. (1974).) Thus, in order to generate 345,800 megawatt hours, roughly 622,000 barrels of oil (at current prices of about $10 per barrel) would be required. The addition of new electrical capacity costs roughly $500 per kilowatt. (*A Time to Choose, supra*, p. 74, Table 12.) In order to calculate the amount of capacity which would have to be added to provide an additional 345,800 kilowatt hours (or which would not have to be added were 345,800 kilowatt hours saved), it is reasonable to assume a reserve margin of 20 percent, and a load factor of 60 percent. Thus, "a typical utility system must have an installed generating capacity about twice the average load demand." (See Federal Energy Administration, *Project Independence*, p. 124

Moreover, the Commission acknowledged in *Ex Parte 295* that:

> "In the long term, the effect of the proposed 3 per cent rate increase will be to perpetuate and increase any inequities that may exist in the rail freight structure between primary and secondary commodities. Such an effect applies particularly to waste paper and to non-ferrous metals for which the Interstate Commerce Commission has computed differentials in favor of primary materials[,]" [19]

and that:

> "[t]o the extent that [the proposed 3 percent rate increase] decreased the movement of scrap and brought about a corresponding increase in the consumption of virgin metal, there may be adverse effects on the environment . . . , relating not only to accumulation of solid waste but also to the secondary consequences of resource consumption, higher level of pollutants discharged during processing,[20] and—most of all—greatly increased demands for energy.[21] In this connection, strong arguments can be made, generally and qualitatively, that by increasing the

(1974).) Assuming a 365-day year of 8,760 hours, roughly 79,000 kilowatts of capacity would be required. At $500 per kilowatt the cost would be $39,500,000. The Commission attempts to dismiss this increased power consumption (as well as the other expected impacts of a 3 percent increase on freight rates for recyclables) as "insignificant" (*Ex Parte 295* Impact Statement, p. xiii), but admits that this characterization is "necessarily" subjective. (*Id.*, p. 7-36.) Such a characterization, of course, is not within the Commission's historic area of expertise.

[19] *Id.* at xv-xvi.

[20] See n. 16, *supra*.

[21] For example, the Commission states that "the use of virgin ores in the production of aluminum requires approximately 20 times as much energy to produce as an equivalent amount of secondary metal." *Id.* at p. 2-3.

> total costs of recycling, *raising the rail freight rates will significantly decrease scrap reclamation.*"[22] (Emphasis added.)

The impact statement in *Ex Parte 295*, moreover, implicitly conceded many of the flaws which the reviewing agencies, and the lower court, found in the present impact statement. For example, the Commission acknowledged that a principal analytical technique used in the present impact statement—an attempt to demonstrate the lack of connection between freight rates and scrap movements solely by reference to historical comparisons which took no account of other variables—was "unfair as well as imprecise." (*Id.*, p. 7-4).

C. The Present Controversy

Notwithstanding the Commission's belated progress in proceedings subsequent to this one, a number of issues remain for resolution by this Court. These issues are relatively narrow, simple and straightforward. Jurisdictional problems aside, they boil down to Nos. 3, 4, and 5 of the Questions Presented, pp. 2-3, *supra*.

One of the Commission's principal claims here is that it is impossible, in the context of this or any other general revenue proceeding, to produce an impact statement which considers not only the marginal effects of the rate increases then under consideration, "but also the basic rate structure upon which they are predicated." (Gov.J.S., p. 14). Despite this claim of impossibility, however, the Commission *did* issue, shortly after the judgment appealed from, a final environmental impact statement [23] which the Commission claims, in another proceeding, to be a thorough and adequate examination of the underly-

[22] *Id.* at p. 2-19 (emphasis added).

[23] Impact statement, *Ex Parte 270*, Sub-Nos. 5 and 6 (lodged with the Clerk of this Court). See pp. 63-66, *infra*.

ing rate structure for ferrous scrap. The Commission characterizes ferrous scrap here as "the principal commodity at issue" (Gov.J.S., p. 14) and as "the major recycled waste product" (Gov.Br., p. 9). The Commission evidently decided not to adapt this existing study for use in complying with the mandate of the court below—but rather to insist in this Court on the impossibility of such compliance.

On December 2, 1974, the Council on Environmental Quality wrote to the Commission, saying that the CEQ is "concerned . . . over the apparent refusal by the Commission to use" this existing analysis:

> "in rate increase proceedings which are still ongoing, *such as Ex Parte No. 281* [the proceeding involved in the present case] and thus the continuing delay in applying an analysis of the underlying rate structure to the Commission's revenue proceedings." (Emphasis added.)

In the same letter the CEQ pointed out that:

> "The Commission has recently demonstrated its ability to develop this type of analysis. . . . And henceforth it should be a relatively simple matter for the Commission to update these analyses, and use them in connection with future rate increase proposals being investigated by the Commission." [24]

The Commission has been on notice at least since 1968 of government studies which concluded that transportation costs are a "principal constraint" on the recycling of certain types of scrap, and that:

> "Whatever the merits . . . of [a] plea for increased freight charges on iron and steel scrap may be, any such increase will add that much more difficulty to the job of clearing away the junk metal which already clutters too much of our American landscape." [25]

[24] See pp. 6a-8a, *infra*.

The Commission has had five full years, since the effective date of NEPA, to prepare its own study of the environmental impact of the underlying rail rate structure, which could be periodically updated and adapted for use in impact statements on particular rate increases. Almost three of those five years have elapsed since the start of the present litigation. One of those five years has elapsed since the judgment of the court below, from which the present appeals are taken.

SUMMARY OF ARGUMENT

I.

The Court lacks jurisdiction of these appeals, which are not from the grant or denial of an "injunction," as required by 28 U.S.C. § 1253, but rather from the grant of relief which both the lower court and the Government have characterized as a "declaration." 371 F.Supp. at 1295; Gov.Br., p. 12. *Compare Mitchell* v. *Donovan*, 398 U.S. 427 (1970); *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144 (1963). The order appealed from has none of the essential elements of an injunction. No one has been enjoined. The effect of the lower court's order on appellants has been "totally noncoercive." *Mendoza-Martinez*, *supra*, at 155. As the lower court stated, and as no one now disputes, the *only* practical consequence of its order is that the Railroads are precluded from making an argument they might otherwise make in hypothetical administrative proceedings which have never actually occurred, and whose likelihood appears to have diminished with the passage of a year since the lower court's order.

[25] Letter from Secretary of the Interior Stewart L. Udall to Hon. Paul J. Tierney, Chairman of the ICC, June 17, 1968. (This letter appears at pp. 69-70 of the Joint Appendix in *United States* v. *SCRAP*, Nos. 72-535 and 72-562.)

See 371 F.Supp. at 1308, n. 50. No rates have been enjoined, and the Commission has not been prevented from approving subsequent general revenue increases. The lower court's order is not an "injunction" under the canon of narrow construction applicable to 28 U.S.C. § 1253. *Compare Gonzalez* v. *Automatic Employees Credit Union*, No. 73-858, 43 U.S.L.W. 4025 (U.S. Dec. 10, 1974).

II.

The Commission's general revenue proceedings held under § 15(7) of the Interstate Commerce Act, 49 U.S.C. § 15(7), are not, as the Railroads would have it, immune from judicial review to determine whether the Commission has complied with relevant procedural mandates. The Railroads contend that a party who seeks to enforce the Commission's duty to prepare a single environmental impact statement on a single general revenue proceeding covering literally thousands of rates must first initiate rate-by-rate reparation proceedings under § 13(1) of the Interstate Commerce Act, 49 U.S.C. § 13(1) and seek, through such proceedings, to obtain a separate impact statement on each challenged rate. The Commission conspicuously fails to join the Railroads in making this argument, and, indeed, has given its opinion that such a procedure would be administratively impossible (A. 21). In *Atlantic City Elec. Co.* v. *United States* and *Alabama Power Co.* v. *United States*, 400 U.S. 73 (1970), two cases not involving NEPA, the Commission vigorously disputed the Railroads' argument that general revenue proceedings are inherently unreviewable.[26] In those cases, the Court divided evenly on that issue. The practical consequence of adopting the Railroads' argument would be that at *no* stage could anyone obtain judicial review

[26] Brief for Appellees United States, *et al.*, Nos. 70-78 and 70-106 at 15-41.

of the procedural NEPA questions which might arise in a general revenue proceeding.

III.

A. The lower court applied the correct legal standard in reviewing the contents, as well as the mere form, of the Commission's environmental impact statement on *Ex Parte 281*, the general revenue proceeding in issue here. Not one single case decided in the five years since NEPA's enactment has adopted the rule proposed by the Railroads, that judicial review under NEPA be confined to determining whether a document exists which meets "the prescriptions of NEPA as to form" (R.R.J.S., p. 22). Not only is such a rule wholly at odds with the existing case law under NEPA; it is also at odds with this Court's recent holdings as to the matters relevant for judicial consideration in review of agency action. *See, e.g., Atchison, T. & S.F. R. Co.* v. *Wichita Board of Trade*, 412 U.S. 800 (1973); *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971). Again, the Government conspicuously fails to join with the Railroads on this issue.

B. The lower court properly applied a "rule of reason" in determining the adequacy of the Commission's impact statement. A fundamental requirement which has been consistently enforced under that rule of reason is that an impact statement must provide sufficient information on the environmental consequences of proposed federal action, and alternatives thereto, to allow informed decisionmaking.

C. Whether the present impact statement was adequate under that rule of reason is basically a factual issue. After consideration of various expert submissions (including the highly unfavorable comments of five federal agencies which reviewed the Commission's impact statement pursuant to the requirements of NEPA, § 102(2)

(C), 42 U.S.C. § 4332(2)(C)) the lower court found the impact statement inadequate to provide a basis for informed decisionmaking. Under F.R.Civ.P. 52(a), the factual determinations of a district court cannot be upset unless the reviewing court finds, "on the entire evidence" that they are "clearly erroneous." *United States* v. *U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948).

D. There is no basis here for finding, under the "clearly erroneous" standard or any other, that the lower court erred in finding the Commission's impact statement inadequate. Reversal of the lower court on this ground would require this Court to hold (a) that the federal agencies which reviewed the impact statement erred in determining that it was inadequate; (b) that the Commission was entitled to ignore the unfavorable judgment of these sister agencies without making a "good faith, reasoned . . . response," *Silva* v. *Lynn*, 482 F.2d 1282, 1285 (1st Cir. 1973); and (c) that, notwithstanding the contrary judgments of these sister agencies and the lower court, the impact statement did in fact contain sufficient information to permit informed decisionmaking.

IV.

The Court should not hold that the Commission has complied with NEPA in the absence of an adequate impact statement. In the words of Chief Judge Friendly (written with respect to this same Commission) "the integrity of NEPA" is at stake here. *City of New York* v. *United States*, 337 F.Supp. 150, 160 (E.D.N.Y. 1972) (three judge court). The Commission's non-compliance stems from a long-established pattern of obduracy which the Commission has maintained not only toward NEPA, the lower court and appellees, but also toward the federal environmental agencies, since the enactment of NEPA. The Court should take into account (a) that this is not a hard case which would warrant it in making bad law

(neither the Commission nor the Railroads having pointed to any practical hardship arising out of the lower court's judgment), and (b) that this is the Court's first plenary consideration of the requirements of NEPA § 102(2)(C), and that the Court's disposition of the case will necessarily have wide repercussions, not only in the few instances where an impact statement becomes the subject of litigation, but also in the many instances where the question is how seriously the agencies will continue to take NEPA.

V.

The lower court was clearly correct in finding, as a matter of fact, that an oral hearing was part of the "existing agency review processes" in *Ex Parte 281*, so as to require that the Commission's impact statement be made available in draft form prior to the hearing. NEPA, § 102(2)(C); *see* Council on Environmental Quality, *Guidelines: Preparation of Environmental Impact Statements*, 40 C.F.R. § 1500.7(d). The real issue is simply one of appropriate relief, *i.e.*, whether the Commission should be required, a year after the lower court's order, to hold another oral hearing in *Ex Parte 281* after the preparation of an adequate impact statement.

VI.

This is a case in which a great deal of water has clearly passed under the bridge since the illegalities in issue, and since the judgment of the lower court. Should this Court reach the merits, it should affirm that judgment. Appellants would still be able to return to the lower court to petition for modification of its decree in light of changed circumstances. F.R.Civ.P. 60(b)(5), (6). Indeed, one of the enduring mysteries of the case is the Commission's failure to do so in light of subsequent impact statements which implicitly conceded—and,

to a degree, cured—the blatant inadequacies of the statement in issue.

ARGUMENT

I. THIS COURT LACKS JURISDICTION OF THE PRESENT APPEALS.

Appellants[27] contend that this Court has jurisdiction of the present appeals pursuant to 28 U.S.C. § 1253, which provides for a direct appeal to the Supreme Court

> "from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit, or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

These appeals, however, are not from the grant or denial of an "injunction." Although appellees originally sought an injunction, and a three-judge district court was convened to consider that request under 28 U.S.C. § 2325 (since repealed),[28] the district court denied the requested injunction and no party now appeals from that denial. It is well established that a party which prevails as to the grant or denial of an injunction before a three-judge

[27] Reply of the United States and Interstate Commerce Commission (Sept. 1974) ("Gov. Reply"); Reply of Appellant Railroads (Sept. 1974) ("R.R. Reply").

[28] Section 2325 required a three-judge district court in suits for "an interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission." It was repealed by P.L. 93-584, § 7 (Jan. 2, 1975). Under the new statutory scheme, "a proceeding to enjoin or suspend, in whole or in part a rule, regulation or order of the Interstate Commerce Commission shall be brought in the court of appeals . . .," P.L. 93-584, § 5, except that § 10 provides that "actions to enjoin or suspend orders of the Interstate Commerce Commission which are pending when this Act [P.L. 93-584] becomes effective shall not be affected thereby. . . ." The pertinent text of P.L. 93-584 appears at pp. 2a-3a, *infra*. The pertinent statutory scheme as it stood prior to P.L. 93-584 appears at pp. 1a-2a, *infra*.

court as—appellants did here—has no right of direct appeal on the other issues in the case. *Public Service Comm'n* v. *Brashear Freight Lines, Inc.*, 306 U.S. 204 (1939); see also *Gunn* v. *University Committee to End the War*, 399 U.S. 383, 389 (1970).

The present appeals were taken from a judgment which declared the invalidity of orders entered by the Interstate Commerce Commission in a general revenue proceeding. But the lower court specifically refused to enjoin collection of the increased freight rates authorized by these orders, and these rates are in fact being collected. As the lower court observed, quoting from this Court's opinion in *Atchison T. & S.F. R. Co.* v. *Wichita Board of Trade*, 412 U.S. 800, 818 (1973)—and as no party now denies—the *only* consequence of the lower court's holding the Commission's orders invalid is that the Railroads would not be able to rely, in certain hypothetical "subsequent proceedings," on "a [C]ommission finding that the proposed rates were just and reasonable." 371 F. Supp. at 1308, n. 50. The Railroads do not claim to have suffered any pecuniary harm on this account. It does not even appear that any such "subsequent proceedings" have taken place in the year since the judgment appealed from.

In every practical respect, this order is a simple declaratory judgment. Its sole effect is to prevent the Railroads, in hypothetical "subsequent proceedings," from asserting a claim contrary to the judicial declaration—*i.e.*, a claim that the Commission properly found the rates in issue to be just and reasonable. The lower court's order does not determine whether the rates *are* just and reasonable. It does not interfere with the collection of any rate. Nor does it govern the outcome of any rate reparation proceeding that might be brought under § 13(1) of the Interstate Commerce Act, 49 U.S.C. § 13(1). It has not prevented the Commission from authorizing subsequent rate increases in subsequent general revenue proceedings.

The lower court's order thus lacks every one of the fundamental attributes of an injunction. No one has been enjoined. No part of the order is "enforceable by the power of contempt." *Gunn, supra*, 399 U.S. at 389. The order was not styled as an injunction by the lower court, nor is it characterized as such in appellants' jurisdictional statements or briefs. See, *e.g.*, Gov. Br. p. 12. It did not meet the requirements for an injunction as to form under Fed.R.Civ.P. 65(d). See *Gunn, supra*, at 388. It did not "paralyze . . . the operation of an entire regulatory scheme," or even any part thereof. *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 154 (1963). Rather, it affected the Commission's orders, and the Railroads' collection of rates, "in a totally noncoercive fashion." *Id.* at 155.

Appellees specifically invoked the Declaratory Judgment Act (28 U.S.C. § 2201-2202) in the lower court, and that court specifically characterized the relief sought and granted as "*a declaration* that the ICC has failed to comply with NEPA and that the orders approving the [rate] increases are thus void." 371 F.Supp. at 1295.[29] (Emphasis added.) Compare *Mendoza-Martinez, supra*, 372 U.S. at 153-54. It is well settled that a "declaration" is not an "injunction" for purposes of § 1253. In *Mitchell* v. *Donovan*, 398 U.S. 427, 430-31 (1970), this Court held that:

> "Section 1253 by its terms grants this Court jurisdiction only of appeals from orders granting or

[29] The Government concedes this characterization. (Gov. Br., p. 12.) While appellees went further, and also sought injunctive relief which was denied below, that fact is immaterial to the present jurisdictional issue. *Brashear, supra*, 306 U.S. at 206-07; *Gunn, supra*, 399 U.S. at 390, n. 5. And surely it cannot be argued that the lower court granted an injunction merely by "remand[ing the case] to the Commission for further proceedings consistent with the opinion in this case." (Gov. J.S., p. 2b.) See *Gunn, supra*, at 388-89; *Taylor* v. *Board of Education, Etc.*, 288 F.2d 600, 604 (2d Cir. 1961), *cert. den.* 368 U.S. 940 (1961).

> denying injunctions. While there are similarities between injunctions and declaratory judgments, there are also important differences. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 154-155; cf. Zwickler v. Koota, 389 U.S. 241, 254. The provisions concerning three-judge courts, including the provisions for direct appeal to this Court, antedate the Declaratory Judgment Act of 1934 [28 U.S.C. §§ 2201, 2202], but Congress substantially amended the three-judge court provisions in 1937 and 1948 without providing for such direct appeals from orders granting or denying declaratory judgments.
>
> "We have stressed that the three-judge court legislation is not 'a measure of broad social policy to be construed with great liberality,' but is rather 'an enactment technical in the strict sense of the term and to be applied as such.' Phillips v. United States, 312 U.S. 246, 251. Thus this Court's jurisdiction under that legislation is to be literally construed. *It would hardly be faithful to such a construction to read the statutory term 'injunction' as meaning 'declaratory judgment.'*" (Emphasis added.)

This Court has adopted an undeviating "practice of strict construction of statutes authorizing [direct] appeals," *Fornaris* v. *Ridge Tool Co.*, 400 U.S. 41, 42, n. 1 (1970). See also *Mitchell* v. *Donovan, supra; Gunn, supra; Rockefeller* v. *Catholic Medical Ctr.*, 397 U.S. 820 (1970); *Goldstein* v. *Cox*, 396 U.S. 471, 478 (1970); *Phillips* v. *United States*, 312 U.S. 246, 250 (1941). This principle was emphatically reaffirmed only this December, in *Gonzalez* v. *Automatic Employees Credit Union*, No. 73-858, 43 U.S.L.W. 4025 (U.S. Dec. 10, 1974).[30]

[30] In *Gonzalez* the Court held that § 1253 is sometimes to be construed even more narrowly against direct appeals than its literal language might suggest. 43 U.S.L.W. at 4027-28, n. 14-16 and accompanying text. Here, of course, appellees ask only that § 1253 not be construed more broadly in favor of such appeals than its literal language requires.

Direct appeals from trial courts are highly disfavored for two distinct reasons. They deprive this Court of discretionary control of its docket, and they present for Supreme Court review matters not preliminarily passed on by any appellate court.

Appellants would have the Court disregard this "practice of strict construction," construe the lower court's "declaration" expansively as an "injunction," and reach out to review a complex record consisting of some 900 closely printed pages (A. 1-719; Gov.J.S. pp. 1a-1e)—essentially to determine whether the lower court erred in its factual findings as to a single environmental impact statement. (See pp. 45-63, *infra.*)

One could hardly imagine a more anomalous jurisdictional posture. According to the Report of the Study Group on the Caseload of the Supreme Court, 57 F.R.D. 573 at 597 (1972):

> "Since many ICC cases are not of sufficient importance to require review by the Supreme Court, it is clear that the unique treatment of ICC orders is a burden on the Supreme Court that can no longer be justified."

This may be the ultimate unimportant ICC case. It involves, at most, the burden of proof in proceedings which may never be held.[31]

Appellants argue that 28 U.S.C. § 1253 must be construed, in disregard of its actual language, in light of a peculiar history and a hidden social policy that allegedly underlay Chapter 157 of Title 28, U.S. Code (§§ 2321-25) prior to its amendment on January 2, 1975. Chapter 157 governs initial judicial review—not Supreme Court review—of the Commission's orders. But an examination

[31] See Gov.Br., p. 5, n. 4.

of Chapter 157, as it stood prior to this January, shows that it will not support the non-literal and expansive meaning which appellants would give to the word "injunction" as it appears in 28 U.S.C. § 1253.

Pre-amendment[32] 28 U.S.C. § 2321 provided in relevant part that:

> "The procedure in the district courts in actions to enforce, suspend, enjoin, annul or set aside in whole or in part any order of the Interstate Commerce Commission . . . shall be as provided in this chapter.[33]

Section 2322 then provided that "[a]ll actions specified in section 2321" shall be prosecuted by or against the United States. Section 2323 provided that "in the actions specified in section 2321" the Government shall be represented by the Attorney General, and further delineated the roles of the Commission and other interested parties. Section 2324, *now repealed,*[34] granted district courts the power to issue preliminary restraining or suspension orders in actions "to enjoin, set aside, annul or suspend" a Commission order. Finally, § 2325, *now repealed,*[35] stated that:

> "An *interlocutory or permanent injunction* restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges. . . ." (Emphasis added.)

[32] As used in this discussion, the term "pre-amendment" refers to the January 2, 1975 amendments. P.L. 93-584.

[33] Section 2321(a) now provides that such actions shall be brought "in the court of appeals." P.L. 93-584, § 5.

[34] P. L. 93-584, § 7.

[35] *Id.*

This statutory scheme was clear and unambiguous. Chapter 157, prior to the current amendments, governed actions to "enforce, suspend, enjoin, annul or set aside in whole or in part" orders of the Commission. 28 U.S.C. § 2321. However, only those actions that sought "[a]n interlocutory or permanent *injunction*" (emphasis added) were required to be heard by a three-judge district court. 28 U.S.C. § 2325.

Pre-amendment § 2321 was plainly broader than § 2325. It distributed power not only to enjoin, but also to "set aside in whole or in part" the Commission's orders.[36] Appellants slide over this difference, and argue that § 2325 is not to be read literally, but that the broader terminology of pre-amendment § 2321 should be substituted for the actual text of § 2325. Appellants then claim that § 2325—*as thus expansively and non-literally interpreted by appellants*—should be read into § 1253, which authorizes direct appeals only from the grant or denial of an "injunction," in any "civil action . . . required by any Act of Congress to be heard and determined by a district court of three judges." Thus, under appellants' reading, a suit asking *only* "a declaration" as to the validity of an ICC order for purposes of possible "subsequent proceedings" would be, *ipso facto*, a suit for an "injunction" within the meaning of § 2325, from which a direct appeal to this Court would lie under § 1253.

Appellants rely on a number of previous cases, dissimilar to the present one,[37] for the proposition that an action "to enforce, suspend, enjoin, annul or set aside

[36] Section 2321 likewise distributed power to "enforce" Commission orders. But, under § 2325, a three-judge district court was not required in an action for such enforcement.

[37] Even assuming, *arguendo*, that some parallel could be constructed between these cases and this one, "it is also a fact that in the area of statutory three-judge court law the doctrine of *stare decisis* has historically been accorded considerably less than its usual weight." *Gonzalez, supra*, 43 U.S.L.W. at 4027.

in whole or in part" under pre-amendment § 2321 was invariably the same as an action for an "injunction" under § 2325. These are all cases in which the basic issue, directly involved, was the legality of action permitted or proscribed by the ICC. See, *e.g.*, *Chicago, M. & St. P. R.R. Co.* v. *United States*, 366 U.S. 745 (1961); *Ayrshire Collieries Corp.* v. *United States*, 331 U.S. 132 (1947).

Here, by contrast, the order appealed from determines only that the Commission failed to comply procedurally with NEPA in a general revenue proceeding. The lower court's order does not determine the legality or collectibility of any rate. It does not threaten the Railroads' revenue structure, determine reparation claims, or disrupt the Railroads' operations. The almost inconsequential practical effect of the lower court's order is reflected by appellants' leisurely prosecution of these appeals. The Government's brief was not filed until almost a year after the judgment appealed from.[38] Appellants do not claim to have suffered any practical injury or constraint during that year which requires the extraordinary procedure of immediate, direct review by the Supreme Court. To say that appellants have been subject to an "injunction" during that year is to stretch the word beyond recognition.

Nonetheless, according to appellants, the terms "set aside" and "enjoin"—terms used disjunctively in pre-amendment § 2321—must always and in all circumstances mean the same thing, regardless of the facts or practicalities of any particular case. Therefore, appellants

[38] Appellants made no attempt to expedite these appeals; rather they waited until the next to the last day permitted by 28 U.S.C. § 2101(b) before filing their notices of appeal. Gov.J.S., p. 2c. They then sought and obtained multiple extensions of time for the filing of their jurisdictional statements and briefs. Nor did they otherwise behave as if an injunction were at issue. For example, no stay pending appeal was ever sought.

contend, an "injunction" is involved here, even though no one has been enjoined.

While the Railroads cite several commentators who have casually assumed that the terms "set aside" and "enjoin" had the same meaning,[39] none of these commentators had in mind NEPA litigation, or the type of relief granted here. The Railroads similarly claim that the Revisers' Notes accompanying the 1948 revision of the Urgent Deficiencies Act indicated no intent to limit the appealability of the Commission's orders. Yet again no evidence is offered that the Revisers had in mind cases such as this.

It is difficult to credit appellants' argument that § 2325, a *jurisdictional* statute, was nothing more than a loose, shorthand expression of Congressional intent which is not to be taken literally. The nub of the matter is that pre-amendment § 2321 described a class of lawsuits, while § 2325 described only a subset of that class. Had the drafters meant the two to be synonymous, they not only could have said so, but they *would* have said so—*precisely as they did in all other sections of Chapter 157 as it stood prior to January 2, 1975.* (§ 2322—"[a]ll actions specified in section 2321"; § 2323—"in the actions specified in section 2321"; § 2324—"enjoin, set aside, annul or suspend"). Further, while the authors of pre-amendment Chapter 157 were careful to adopt the language of pre-amendment § 2321 in the remainder of the chapter, they conspicuously *omitted* from § 2325 the following portion of its predecessor in the Urgent Deficiencies Act, 38 Stat. 220:

> ". . . and upon the final hearing of any suit brought *to suspend or set aside*, in whole or in part, any order of said commission the same requirement as

[39] R.R. Reply at p. 3-4.

> to judges and the same procedure as to expedition and appeal shall apply." (Emphasis added.)

Finally, it must be recalled that appellants' claim that pre-amendment § 2321 was synonymous with § 2325 becomes relevant only if this Court first concludes that every order that was an "injunction" within the meaning of § 2325 is *ipso facto* an injunction within the meaning of § 1253. The established principle that § 1253 must be narrowly construed makes such a conclusion unsupportable.

While the distinction between suits to "set aside" Commission orders and those seeking an "injunction" was perhaps of no practical significance in the usual run of ICC cases tried before three-judge courts, that distinction is crucially important here. Because appellees sought an injunction initially, a three-judge court was properly convened. Had they requested only the relief ultimately granted, a single judge court would have been proper. Because the court below denied the requested injunction, appellees—but not appellants—might have appealed to this Court. *Brashear Freight Lines, supra.* That appeal would have drawn in question a refusal to grant an injunction. But appellants, who prevailed on that issue, are not properly before this Court under 28 U.S.C. § 1253.[40]

[40] The Railroads assert, R.R.Reply at 10, n. 10, that this construction of § 2325 would lead to "[t]he strange consequence . . . that in an action to set aside an ICC order, *pendente lite* relief could be granted only by three judges but ultimate relief could be granted by a single judge." The Railroads are simply repeating the error of assuming that all ICC cases are the same. The true meaning of pre-amendment Chapter 157 was that if the *pendente lite* relief sought was a temporary injunction, then clearly § 2325 required a three-judge court and the losing party could appeal to this Court. But, if the only relief sought was relief of the sort actually granted below, then that request could be considered by a single judge. This is no anomaly but, in truth, simply a further implication of the distinction, embedded in the difference between

To recapitulate:

1. Section 1253 requires an appeal from the grant or denial of an "injunction."

2. No one argues that an injunction is at issue here, in any literal sense of that term.

3. Appellants argue that a kind of metaphorical injunction is at issue. To prevail in that argument appellants must prove *both* of the following propositions:

(a) That a judgment "set[ting] aside" an ICC order within the meaning of pre-amendment § 2321 must *always* be an "injunction" within the meaning of §2325; and

(b) That a judgment which is an "injunction" under § 2325 *solely* by virtue of proposition (a) must *always* be an "injunction" within the meaning of § 1253.

Appellants must prove that all of these concepts are *always* identical, because there is nothing that makes them identical here if they are not always so. On the contrary, the lower court and the Government have both characterized the relief appealed from here as a "declaration" (371 F.Supp. at 1295; Gov.Br., p. 12)—a type of judgment which this Court has repeatedly held not to be an "injunction" under § 1253. *E.g., Mitchell, supra; Mendoza-Martinez, supra.*

4. As a matter of ordinary English usage (to say nothing of the canon of strict construction applicable to statutes which authorize direct appeals) *neither* proposition (a) nor proposition (b) is supportable. In short, unless these appeals are permitted by some heretofore unannounced federal common law of Supreme Court jurisdiction over NEPA cases involving the ICC, these appeals will not lie because no "injunction" is at issue.

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§§ 2321 and 2325, between two substantively different forms of relief that have entirely different consequences.

II. THE COMMISSION'S GENERAL REVENUE PROCEEDINGS ARE NOT IMMUNE FROM JUDICIAL REVIEW TO DETERMINE COMPLIANCE WITH THE PROCEDURAL REQUIREMENTS OF NEPA.

The Railroads assert that the lower court lacked jurisdiction in this case, because the Commission's general revenue proceedings are not subject to judicial review. (R.R.Br., pp. 21-34). The Railroads' argument is that a party who seeks specific enforcement of the Commission's duty to prepare a single impact statement in a single general revenue proceeding, which covers "literally thousands of individual rates" (R.R.J.S., p. 31), must first seek separate impact statements, rate-by-rate, in administrative reparation proceedings under 49 U.S.C. § 13(1), before he can assert any claim in court.[41]

Not surprisingly, the Commission—which would have the burden of preparing this plethora of individual impact statements, and conducting these § 13(1) proceedings —has not endorsed the Railroads' contention. In fact the Commission says, in the impact statement at issue here, that:

> "It probably would not be possible for us to issue separate environment[al] impact statements for each specific commodity which has been classified as re-

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[41] As the lower court stated:

> "It is suggested [by the Railroads] that an environmental group, while it could not obtain reparations [in a § 13(1) proceeding], should be able to complain that a particular charge on a particular item is unreasonable because of its environmental effects. Thus if SCRAP could initiate an investigation on this theory, it could argue further that before rejecting the complaint the Commission would have to prepare and consider an environmental impact statement [on the individual rate challenged, not on the cumulative effects of the general revenue order]. But we know of no Commission order or judicial opinion accepting this theory and it is thus too speculative and too unrealistic to support a denial of jurisdiction." 371 F.Supp. at 1297.

cyclable in this [general revenue] proceeding." (A. 21).

In two recent cases before this Court which did not involve NEPA, *Atlantic City Elec. Co.* v. *United States* and *Alabama Power Co.* v. *United States*, 400 U.S. 73 (1970), the Commission, on the basis of a careful analysis, squarely opposed the Railroads' contention that the Commission's general revenue proceedings are immune from direct judicial review.[42] The Court split evenly on that issue in those two cases.

The Commission's dispute with the Railroads in *Atlantic City* and *Alabama Power* is discussed in detail in the brief of appellee Institute of Scrap Iron and Steel ("ISIS"). SCRAP and EDF, *et al.* adopt the ISIS argument on this issue, and point out in addition that not only would the preparation of individual impact statements on a rate-by-rate basis be administratively burdensome, but also the net result would not be the practical equivalent of a single impact statement on a general revenue proceeding. As the court below correctly noted, an adequate analysis of the cumulative environmental effects of a general revenue order—which is the specific relief sought and ordered below—involves "far different questions," 371 F.Supp. at 1298, from those that can be raised in § 13(1) proceedings, which are available only in individual instances where a carrier (*not* the Commission) is alleged to have violated the Interstate Commerce Act (*not* NEPA).[43]

Thus the effect of the Railroads' proposed rule would not be merely to postpone judicial review of the Commission's compliance with NEPA in its general revenue proceedings, while relief *on that issue* was sought from the

[42] See Brief for Appellees United States, *et al.*, Nos. 70-78 and 70-106, at 15-41.

[43] *Compare* pp. 59-60, *infra*.

Commission. The effect of the Railroads' rule would be to foreclose review of that issue altogether, in contradiction of the Court's holdings on reviewability in cases such as *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 410 (1971); *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 141 (1967); *Rusk* v. *Cort*, 369 U.S. 367, 379-80 (1962); *Brownell* v. *We Shung*, 352 U.S. 180, 185 (1956); and *Marcello* v. *Bonds*, 349 U.S. 302, 310 (1955). Judicial review would be restricted to the "far different questions" which could be raised under § 13(1).

This foreclosure of review would preclude environmental groups such as SCRAP and EDF, *et al.* from litigating the issue which has practical consequences for them, their members and the environment, namely the asserted *cumulative* environmental impact of a percentage rate increase which includes rates on recyclables.

III. THE DISTRICT COURT CORRECTLY FOUND THE COMMISSION'S IMPACT STATEMENT INADEQUATE.

A. The District Court Applied the Correct Legal Standard in Reviewing the Contents, as well as the Mere Form, of the Impact Statement.

The Railroads argue that the lower court erred by reviewing the contents, as well as the mere form, of the Commission's impact statement. (R.R.Br., pp. 34-39; R.R.J.S., pp. 22-28). On this issue as well they apparently part company with the Government.

Under the Railroads' reading of NEPA, an agency which drafts an impact statement would be its own final judge of whether that statement adequately and accurately sets forth—as it must—such information as the "alternatives to the proposed action," NEPA, § 102(2)

(C) (iii), 42 U.S.C. § 4332(2) (C) (iii); *Natural Resources Defense Council* v. *Morton*, 458 F.2d 827 (D.C. Cir. 1972), and the "full range of responsible opinion on the [proposed action's] environmental effects," *Committee for Nuclear Responsibility* v. *Seaborg*, 463 F.2d 783, 787 (D.C. Cir. 1971). On the Railroads' reading of the Act, the reviewing court's task would be complete once it ascertained that the agency had prepared a document labeled an "impact statement" which met "the prescriptions of NEPA as to form" (R.R.J.S., p. 22), and ascertained that this document had been circulated for comment according to the procedural requirements of § 102(2) (C) (R.R.Br., pp. 38-39; *cf. id.*, p. 50). The only circumstance in which the Railroads admit that an impact statement could be held invalid because of the inadequacy of its contents is where the statement is "perfunctory, feigned, or pro forma" (R.R.Br., p. 37), so as to be clearly "arbitrary, capricious [or] an abuse of discretion" within the meaning of 5 U.S.C. § 706(2) (A).

The Railroads thus contend for a standard of review which has been recently and unanimously rejected by all thirteen judges of the Ninth Circuit, sitting *en banc*. In *Lathan* v. *Brinegar*, Nos. 72-2932 and 72-2974, —— F.2d ——, 7 ERC 1048, 1057-58 (9th Cir., filed Sept. 27, 1974) that court held that review of an impact statement's contents lies under 5 U.S.C. § 706(2) (D), rather than under § 706(2) (A), and that an impact statement deficient in its contents requires the court, under subsection (2) (D), to "hold unlawful or set aside agency actions, findings and conclusions found [on that account] to be . . . without observance of procedure required by law." The Ninth Circuit concluded that review of impact statements under this comparatively broader standard will better serve the purposes of NEPA "than if [the courts] confine themselves with the straight jacket of § 706(2) (A)," and that

the judiciary "can, and should, require full, fair, bona fide compliance with NEPA." *Id.* at 1058.[44]

The Railroads' argument on this issue consists of a play on the words "substantive" and "procedural." In several cases, including *Lathan*, there has been language to the effect that judicial review of "substantive" agency decisions is limited under NEPA, and that once an agency has produced an adequate impact statement, the reviewing court should be reluctant to overturn the agency's decision to proceed with its proposed substantive action, whether that action consists of building a dam or a highway, or, as here, of approving rail freight increases. A sampling of such cases is set forth in the margin.[45]

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[44] In *National Helium Corp.* v. *Morton*, 486 F.2d 995 (10th Cir. 1973), *cert. den.*, 416 U.S. 993 (1974), the Tenth Circuit—like the unanimous Ninth Circuit in *Lathan*—rejected the proposition that review of an impact statement is limited by the " 'arbitrary and capricious' standard of § 706 of the APA," 486 F.2d at 1001. The Tenth Circuit explained that:

> "In assessing the adequacy of the impact statement, we are not here reviewing . . . agency action within the meaning of § 706 of the APA. Rather, we are concerned with the NEPA requirement which is, to be sure, a prerequisite for agency action but is not agency action itself. The trial court's conclusion that it was required . . . to apply the arbitrary and capricious standard was, in our view, erroneous." *Id.*

In so holding, the Tenth Circuit expressly followed Judge Wright's opinion in *Scientists' Institute for Public Information* v. *Atomic Energy Comm'n*, 481 F.2d 1079 (D.C. Cir. 1973) which the Tenth Circuit said "expounds the standards more clearly than earlier decisions." 486 F.2d at 1002.

[45] *See, e.g., Lathan, supra*, 7 ERC at 1057-58; *Environmental Defense Fund* v. *Armstrong*, 487 F.2d 814, 822, n. 13 (9th Cir. 1973); *National Helium Corp.* v. *Morton*, 486 F.2d 995, 1001-05 (10th Cir. 1973), *cert. den.* 416 U.S. 993 (1974); *Scientists' Institute for Public Information* v. *Atomic Energy Comm'n*, 481 F.2d 1079, 1082, n. 1 (D.C. Cir. 1973); *Jicarilla Apache Tribe of Indians* v. *Morton*, 471 F.2d 1275, 1279-80 (9th Cir. 1973). *But see, Environmental Defense Fund* v. *Corps of Engineers*, 492 F.2d 1123, 1138-41 (5th Cir. 1974); *Sierra Club* v. *Froehlke*, 486 F.2d 946, 952 (7th Cir. 1973); *Conservation Council* v. *Froehlke*, 473 F.2d

The Railroads' contention is that an agency's decision whether (or how thoroughly) to analyze a particular "environmental impact" or "alternative to the proposed action" in an impact statement is likewise "substantive," in the sense that it affects the "substance" of the impact statement, and that the courts must therefore defer to such decisions.

It is utterly plain, though, that an agency's decision on what to include in an impact statement is *not* "substantive" in the sense of the cases just cited, and that the courts are not, as the Railroads would have it, powerless to determine independently whether the contents of the impact statement are adequate. Indeed *Lathan* specifically holds that this kind of decision is "procedural," 7 ERC at 1058, and subject to thorough judicial scrutiny on review.[46]

In *Silva* v. *Lynn*, 482 F.2d 1282 (1st Cir. 1973), a case cited approvingly in *Lathan*, 7 ERC at 1058, the First Circuit made clear that the adequacy of an impact statement is something the reviewing court must determine for itself, taking into account the facts and circumstances of the particular case, including the full administrative record developed by the agency.

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664 (4th Cir. 1973); *Cape Henry Bird Club.* v. *Laird*, 359 F.Supp. 404, 410-11 (W.D. Va. 1973) *aff'd per curiam* 484 F.2d 453 (4th Cir. 1973), *Environmental Defense Fund* v. *Froehlke*, 473 F.2d 346, 352-55 (8th Cir. 1972); *Environmental Defense Fund* v. *Corps of Engineers*, 470 F.2d 289, 297-301 (8th Cir. 1972), *cert. den.* 412 U.S. 931 (1973); *Calvert Cliffs' Coord. Comm.* v. *Atomic Energy Comm'n*, 449 F.2d 1109, 1115 (D.C. Cir. 1971).

[46] A genuine issue as to "substantive" review would be presented if the lower court had sustained the impact statement but nonetheless enjoined collection of the increased rates on the ground that they violated the substantive policies announced in § 101 of NEPA, 42 U.S.C. § 4331. But in fact the lower court did exactly the opposite. It found the impact statement inadequate, but left the rates in effect.

The First Circuit explained, *id.* at 1284, that:

> "[E]ven assuming that the final EIS [environmental impact statement] might seem fully adequate standing alone, uncertainty must attend a court's approval of a statement [where the court is unfamiliar with the] 'record of expert views and opinions the technological data and other relevant material . . . on which the agency acted' . . . , Appalachian Power Co. v. E.P.A., 477 F.2d 495, 507 (4th Cir. 1973)."

The First Circuit held that "the adequacy of the EIS" depends on such matters as whether the agency has adequately explored "alternatives to recommended courses of action," included "enough scientific reasoning to alert specialists to particular problems within the field of their expertise," and "'afford[ed] a basis for a comparison of the problems involved with the proposed project and the difficulties involved in the alternatives.'"[47] 482 F.2d at 1284-85. In language highly apposite to the present case, the First Circuit also held, *id.* at 1285, that:

> "[W]here comments from responsible experts or sister agencies disclose new or conflicting data or opinions that cause concern that the agency may not have fully evaluated the project and its alternatives, these comments may not simply be ignored. There must be good faith, reasoned analysis in response."

The First Circuit concluded that the impact statement at issue in *Silva* fell "far short of what is required," *id.* at 1285, a conclusion which the court clearly based on independent scrutiny of the impact statement and the other evidence before it. For example, the court found that drainage problems attendant on proposed construction had been insufficiently analyzed, and that the agency had failed to meet the criticisms of other agencies, which,

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[47] *Quoting Monroe County Conservation Council* v. *Volpe*, 472 F.2d 693, 697 (2d Cir. 1972).

as here, had found the draft statement "inadequate." *Id.* at 1285-86.

The standard of review employed in other circuits is similar. Thus in *Environmental Defense Fund* v. *Corps of Engineers*, 348 F.Supp. 916 (N.D.Miss. 1972), *aff'd* 492 F.2d 1123 (5th Cir. 1974), the district court noted that:

> "The substantial grounds of plaintiffs' challenge to the adequacy of the EIS [on a proposed waterway] relate to the areas of (1) fauna, (2) water quality, (3) geology, (4) history and archaeology, and (5) other detrimental effects upon riverine ecology. The court, therefore, must examine each of these areas in the light of the remarkable diversity of opinion expressed by experts tendered by both sides, bearing in mind that the burden of persuasion rests upon plaintiffs." 348 F.Supp. at 933. (Emphasis added).

The district court then proceeded to make such an independent examination, as a result of which it found the impact statement to be adequate. *Id.* at 934-40. The Fifth Circuit affirmed, holding that:

> "The record demonstrates no mistake of law and no clear error of fact in the district court's holding. . . ." 492 F.2d at 1127.

In *Environmental Defense Fund* v. *Froehlke*, 473 F.2d 346 (8th Cir. 1972), the Eighth Circuit *reversed* a district court's finding that an impact statement was adequate. The grounds relied upon for reversal were as follows:

> "The final impact statement [on a channelization project] . . . is not sufficiently detailed to meet the standards of the Act [NEPA]. It is too vague, too general and too conclusionary. Thus it cannot form a basis for responsible evaluation and criticism. * * *

> "The most significant failure of the . . . impact statement is its unsatisfactory discussion of alternatives to [the proposed action]. * * *
>
> "In this case, a number of alternatives to the proposed project have been suggested by responsible critics, including state and federal agencies and private groups and individuals. * * *
>
> "While some of these alternatives were mentioned in the impact statement and others set forth by including letters received by [sic] those who had suggested them, none were discussed in detail by the Corps.
>
> "This treatment of alternatives is insufficient. * * *
>
> "The Corps . . . argues that it was not necessary to discuss in greater detail the alternative of acquiring land to mitigate the loss of natural resources. . . . We disagree. * * *
>
> ". . . [W]e see no practical reason why the Corps could not have included in its final impact statement a thorough exploration of the possibility of mitigation. . . . * * *
>
> "While the . . . impact statement fails to meet the standard of detail required by NEPA in other respects besides the discussion of alternatives, we think it unnecessary to discuss these at the present time." 473 F.2d at 348-52, *passim.*

The Railroads, curiously, rely on *Froehlke* for the proposition that "the courts . . . have recognized that judicial review of impact statements is quite limited." (R.R.Br., p. 36) But whatever the phrase "quite limited" may mean, it is clear that review in *Froehlke* was no more limited than review here. The court in *Froehlke* did exactly what the lower court did in this case. It reviewed the contents of a challenged impact statement, measured them against an evidentiary record, and found

those contents inadequate for lack of certain specified studies, and for failure to respond adequately to the comments of other agencies and members of the public.

Similarly, in *Monroe County Conservation Council* v. *Volpe*, *supra*, 472 F.2d at 693, the Second Circuit found that an impact statement was inadequate where, in the court's judgment:

> "The statement [made] passing mention of possible alternatives to the proposed action . . . , but it [did] so in such a conclusory and uninformative manner that it afford[ed] no basis for a comparison of the problems involved with the proposed project and the difficulties involved in the alternatives. *Id.* at 697.

Other courts as well have recognized and discharged their responsibility to give meaningful independent review to the contents, as well as the mere form, of challenged impact statements.[48] Indeed, only last September one of

[48] *See, e.g., Natural Resources Defense Council* v. *Tennessee Valley Auth.*, 502 F.2d 852 (6th Cir. 1974); *Natural Resources Defense Council* v. *Morton*, 458 F.2d 827 (D.C. Cir. 1972); *Ely* v. *Velde*, 451 F.2d 1130, 1138-39 (4th Cir. 1971); *Committee for Nuclear Responsibility* v. *Seaborg*, 463 F.2d 783, 787 (D.C. Cir. 1971); *Warm Springs Dam Task Force* v. *Gribble*, 378 F.Supp. 240 (N.D.Cal. 1974), *stay granted*, 417 U.S. 1301 (1974) (Douglas, J.); *Nelson* v. *Butz*, 377 F.Supp. 819, 821-23 (D.Minn. 1974); *Natural Resources Defense Council* v. *Stamm*, 6 ERC 1525 (E.D.Cal. 1974); *I-291 Why? Ass'n* v. *Burns*, 372 F.Supp. 223, 243-62 (D.Conn. 1974); *Canal Auth. of Florida* v. *Callaway*, 6 ERC 1808 (M.D.Fla. 1974), *remanded with instructions*, 489 F.2d 567 (5th Cir. 1974); *Movement Against Destruction* v. *Volpe*, 361 F.Supp. 1360, 1388-89 (D.Md. 1973), *aff'd*, 500 F.2d 29 (4th Cir. 1974); *Montgomery* v. *Ellis*, 364 F.Supp. 517, 521 (N.D.Ala. 1973); *Natural Resources Defense Council* v. *Grant*, 355 F.Supp. 280, 286 (E.D.N.C. 1973); *Farwell* v. *Brinegar*, 5 ERC 1939 (W.D.Wis. 1973); *Ohio ex rel. Brown* v. *Callaway*, 364 F.Supp. 296 (S.D.Ohio 1973), *aff'd in part, rev'd in part and remanded*, 497 F.2d 1235 (6th Cir. 1974); *Daly* v. *Volpe*, 350 F.Supp. 252, 258-59 (W.D.Wash. 1972); *Brooks* v. *Volpe*, 350 F.Supp. 269, 275-80 (W.D.Wash. 1972), *aff'd*, 487 F.2d 1344 (9th Cir. 1973); *Environmental Defense Fund* v. *Tennessee Valley Auth.*, 339 F.Supp. 806, 809 (E.D.Tenn. 1972), *aff'd*, 468 F.2d 1164 (6th Cir. 1972), *application for stay denied*

the appellant Railroads succeeded in having an impact statement held invalid on the ground that its contents were inadequate. *Atchison, T. & S.F. Ry.* v. *Callaway*, 382 F.Supp. 610 (D.D.C. 1974); cf. *Chemical Leaman Tank Lines, Inc.* v. *United States*, 368 F.Supp. 925, 946-49 (D. Del. 1973) (three-judge court).

Appellants have cited *no* case—and SCRAP and EDF, *et al.* know of none—in which a court has sustained the rule the Railroads propose here, *i.e.*, that once an agency has merely met "the prescriptions of NEPA as to form" (R.R.J.S., p. 22), the contents of its impact statement then lie beyond judicial review.[49]

The Railroads thus ask that this Court overturn a sound, well-settled body of case law and establish a wholly new and radically restricted standard for judicial review of impact statements. The effect of this departure would be to give unreviewable discretion in the preparation of impact statements to an agency, the Commission, which has already gone to extraordinary lengths to defeat both the letter and the spirit of NEPA. *See, e.g., Harlem Valley Transp. Ass'n* v. *Stafford*, 500 F.2d 328, 331-32 (2d Cir. 1974); *SCRAP* v. *United States*, 371 F.Supp.

414 U.S. 1036 (1973); *Akers* v. *Resor*, 339 F.Supp. 1375 (W.D. Tenn. 1972); *Environmental Defense Fund* v. *Corps of Engineers*, 325 F.Supp. 749, 759 (E.D.Ark. 1971), 342 F.Supp. 1211 (E.D. Ark. 1972), *aff'd*, 470 F.2d 289 (8th Cir. 1972). *Cf. Smith* v. *City of Cookeville*, 381 F.Supp. 100, 111 (M.D.Tenn. 1974).

[49] Besides arguing that a court may not hold an impact statement invalid on the basis of its contents, the Railroads also contend that merely by specifying the deficiencies in the present impact statement, the lower court injected itself impermissibly into the Commission's procedures on remand (R.R.Br., pp. 48-50). But this, of course, is nothing more than another way of arguing the same contention, *i.e.*, that all impact statements are valid merely by the fact of their existence. If a court were forbidden to specify *how* and *why* an impact statement was defective, it would be effectively forbidden to find that the statement *was* defective, since, as the Railroads also assert, "the agency's determinations cannot be rejected at large and in the abstract." (R.R.Br., p. 44).

1291, 1302 (D.D.C. 1974); *Chemical Leaman Tank Lines, supra*, 368 F.Supp. at 946-49; *SCRAP* v. *United States*, 346 F.Supp. 189, 194-95, n. 8, 200, n. 16, 201, n. 17 (D.D.C. 1972); *City of New York* v. *United States*, 337 F.Supp. 150, 158 (E.D.N.Y. 1972). The rule sought by the Railroads would also give unreviewable discretion to agencies which are institutional proponents of projects such as dams, highways, airports or nuclear reactors to determine whether environmental impacts of, and alternatives to, such projects have been adequately considered. Those agencies would be permitted—and the courts would be *required*—to turn a deaf ear to other federal agencies or responsible experts that protested, as here, that the environmental consideration had been inadequate.

Not only is the Railroads' proposed rule unsupported by the present body of case law under NEPA; it is also unsupported by this Court's other rulings on judicial review of agency action. For example, in *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971), this Court held that even where the court's power to overturn the agency's *substantive* action was narrowly limited under 5 U.S.C. § 706(2)(A), *id.* at 416,[50] the reviewing court was nonetheless required to examine "the full administrative record" on which the agency's action was based, *id.* at 420, so that the court could determine *inter alia*, whether the agency, before acting, had taken account of "the relevant factors." *Id.* at 416.

Similarly, in *Atchison, T. & S.F. Ry.* v. *Wichita Board of Trade*, 412 U.S. 800 (1973), this Court held that

[50] The agency's substantive action in *Overton Park* was a finding pursuant to § 4(f) of the Department of Transportation Act, 49 U.S.C. § 1653(f); 23 U.S.C. § 138, whose direct effect was to allow construction of a federally funded highway through a public park. See *National Helium*, note 44, *supra*, 486 F.2d at 1001, as to the distinction, for purposes of judicial review, between this kind of substantive action, and the preparation of an impact statement.

even where the reviewing court could not enjoin implementation of charges approved by the Interstate Commerce Commission, the court still had a

> "duty . . . to determine whether the course followed by the Commission is consistent with its mandate from Congress. . . . [A] simple examination of the order being reviewed is frequently insufficient to reveal the policies the Commission is pursuing. Thus this Court has relied on the 'simple but fundamental rule of administrative law' . . . that the agency must set forth clearly the grounds on which it acted." *Id.* at 806-07. (Citations omitted.)

Neither *Overton Park* nor *Wichita* contains the slightest hint that the agency's own assertions are dispositive as to whether a factor it failed to consider is "relevant," 401 U.S. at 416, or as to whether it has clearly stated "the grounds on which it acted," 412 U.S. at 807. Rather, *Overton Park* teaches that on such matters the agency is "not to [be] shield[ed] . . . from a thorough, probing, in-depth [judicial] review." 401 U.S. at 415.[51]

It would be highly anomalous if all aspects of an agency's decisionmaking process, and its explication thereof, were subject to such "thorough . . . review"—except those aspects that were reflected in a document labeled an "impact statement," as to which latter aspects the agency, not the court, had the final word. *See, e.g., Silva* v. *Lynn*, *supra*, 482 F.2d at 1283-84; *Ely* v. *Velde*, *supra*, 451 F.2d at 1138-39. Yet this is precisely the rule for which the Railroads contend.

[51] *See also, Nat'l Labor Rel. Board* v. *Metropolitan Life Ins. Co.*, 380 U.S. 438, 442-44 (1965); *Natural Resources Defense Council* v. *Environmental Protection Agency*, 494 F.2d 519, 526-27 (2d Cir. 1974); *Essex Chemical Corp.* v. *Ruckelshaus*, 486 F.2d 427, 432 (D.C.Cir. 1973), *cert. den.* —— U.S. —— (1974); *Portland Cement Ass'n* v. *Ruckelshaus*, 486 F.2d 375, 393-4 (D.C.Cir. 1973), *cert. den.*, 417 U.S. 921 (1974).

B. The Lower Court Properly Applied the "Rule of Reason" in Reviewing the Commission's Impact Statement.

The Commission accurately points out that "the federal courts . . . have applied a rule of reason when ascertaining whether a federal agency has complied with the requirements of Section 102 [of NEPA]." (Gov.Br., p. 20).

No showing is made, though, that the lower court ignored this rule of reason. In fact, the author of the lower court's opinion, Judge Wright, is one of the principal proponents of the rule. Writing for the District of Columbia Circuit in *Scientists' Institute for Public Information* v. *Atomic Energy Comm'n*, 481 F.2d 1079, 1092 (D.C. Cir. 1973), he observed that:

> ". . . Section 102[2](C)'s requirement that the agency describe the anticipated environmental effects of proposed action is subject to a rule of reason. The agency need not foresee the unforseeable . . . .
>
> "'The statute [NEPA] must be construed in the light of reason if it is not to demand what is, fairly speaking, not meaningfully possible * * *'[52] But implicit in this rule of reason is the overriding statutory duty of compliance with impact statement procedures to 'the fullest extent possible.'"[53]

Rather than abandoning the rule of reason here, the lower court found the Commission's impact statement inadequate in light of that rule. Unlike the Railroads' proposed rule, the rule of reason does not require that every impact statement be found adequate. Nor does the rule of reason limit the reviewing court to determining only

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[52] *Citing Natural Resources Defense Council* v. *Morton*, 458 F.2d 827, 837 (D.C.Cir. 1972).

[53] *Citing Calvert Cliffs' Coord. Comm.* v. *Atomic Energy Comm'n*, 449 F.2d 1109, 1114-15 (D.C.Cir. 1971). (*See also National Helium*, *supra*, 486 F.2d at 1001-02, holding that "rule of reason" requires compliance to "fullest extent possible.")

whether the defects in an impact statement are so egregious as to be "arbitrary, capricious, [or] an abuse of discretion" within the meaning of 5 U.S.C. § 706(2)(A). In fact, the very essence of this rule is that it does *not* so limit the court. *National Helium*, *supra*, 486 F.2d at 1002, n. 5; *see Lathan*, *supra*, 7 ERC at 1058.

One fundamental requirement which the courts have consistently enforced under the rule of reason is that impact statements must set forth sufficient data on environmental effects of proposed action to "form a basis for responsible evaluation and criticism," *Environmental Defense Fund* v. *Froehlke*, *supra*, 473 F.2d at 348. NEPA is not satisfied by impact statements which are "conclusory and uninformative," *Monroe County*, *supra*, 472 F.2d at 697; or which fail to "explicate fully [the agency's] course of inquiry, its analysis and its reasoning," *Ely* v. *Velde*, *supra*, 451 F.2d at 1139; or which do not "contain enough scientific reasoning to alert specialists to particular problems within the field of their expertise," *Silva* v. *Lynn*, *supra*, 482 F.2d at 1285.

C. Under Fed.R.Civ.P. 52(a), the District Court's Findings as to the Inadequacy of the Impact Statement Should Not Be Set Aside Unless a Review of "the Entire Evidence" Shows Those Findings to Be "Clearly Erroneous."

As the cases discussed at pp. 34-42, *supra*, make plain, the adequacy or inadequacy of an environmental impact statement is not a legal question that can be decided *in vacuo*. Rather it is a predominantly factual question, which depends on the specific circumstances of each case, and which cannot be decided except on an adequate evidentiary record.

In the present case, the adequacy or inadequacy of the impact statement is largely a question of economics, *i.e.*,

whether the statement adequately analyzes the economic relationships through which the rail rate structure influences the natural environment, and adequately analyzes alternatives to the rate increase in issue. On the basis of a record which included submissions from five federal agencies and various independent experts, the lower court found that the Commission's impact statement contained no analysis sufficient to support its conclusions, and found, further, that the Commission had not responded adequately, or, indeed, at all, to criticisms advanced by these other agencies or by the independent experts.

These are findings which are entitled to some deference on review. Rule 52(a) of the Federal Rules of Civil Procedure provides that a district court's "[f]indings of fact shall not be set aside unless clearly erroneous . . . ."

This "clearly erroneous" test applies specifically to findings as to the adequacy of scientific, technical or factual analysis in an impact statement. *Environmental Defense Fund* v. *Corps of Engineers*, *supra*, 492 F.2d at 1127, 1137; *cf. National Helium*, *supra*, 486 F.2d at 1002, n. 5.[54] It applies not only to findings based on oral testimony, but also to "inferences drawn from documents," *United States* v. *U. S. Gypsum Co.*, 333 U.S. 364, 394 (1948), and to factual findings which determine a legal question if, as here, the question turns on a "multiplicity of relevant factual elements, with their various combinations, creating the necessity of ascribing the proper force to each." *Commissioner* v. *Duberstein*, 363 U.S. 278, 289

[54] See also p. 14 of the Solicitor General's "Memorandum for the Respondents in Opposition [to Stay]," filed in *Warm Springs Dam Task Force* v. *Gribble*, No. A-1146 (June, 1974) ("clearly erroneous" test assertedly applicable to district court's finding that "all the potential hazards are adequately discussed and were adequately studied" in impact statement on proposed dam); *compare* 417 U.S. 1301 (1974) (Douglas, J., granting stay). *Cf.* Wright, *The Doubtful Omniscience of Appellate Courts*, 41 Minn.L.Rev., 751, 780 (1957).

(1960); see also *McAllister* v. *United States*, 348 U.S. 19, *modification den.*, 348 U.S. 957 (1954).

Moreover, Rule 52(a) applies with special force where a challenged finding involves a choice among expert opinions on technical issues, such as the questions of economic analysis involved in the present case. *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 274-75 (1949).

This Court has held that the "clearly erroneous" standard of Rule 52(a) precludes reversal of a trial court's factual findings except where "the reviewing court *on the entire evidence* is left with the definite and firm conviction that a mistake has been committed," *U. S. Gypsum*, *supra*, 333 U.S. at 395 (emphasis added). *See also Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969); *United States* v. *E. I. DuPont de Nemours & Co.*, 351 U.S. 377, 381 (1956); *McAllister*, *supra*, 348 U.S. at 20-23; *United States* v. *Oregon State Medical Society*, 343 U.S. 326, 339 (1952).

The Railroads assert that:

> "We do not believe that this Court needs to reach and weigh each of the individual criticisms the lower court made of the impact statement . . . in order to hold that the impact statement met the requirements of NEPA." (R.R.Br., p. 38).

But the cases just cited make plain that the factual findings of a district court cannot be set aside except on a review of "the entire evidence." And, as a practical matter, it is difficult to see any basis *other* than "the entire evidence" on which an appellate court could overturn a district court's findings as to the adequacy of the factual, scientific and technical analysis in an impact statement. Certainly the appellate court must look be-

yond the mere length and form of the statement—unless prolixity and empty formalism as such will satisfy NEPA, a proposition for which there is no support in the existing cases. See pp. 34-45, *supra*.

This Court has traditionally been reluctant to attempt *de novo* review of a lower court's findings as to factual issues. *See, e.g., Zenith Radio, supra*, 395 U.S. at 123; *DuPont, supra*, 351 U.S. at 381; *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593, 596-97 (1951); *United States* v. *Yellow Cab Co.*, 338 U.S. 338 (1949). But in any event, there is no basis here for a "definite and firm conviction" [55]—or, indeed, any conclusion at all—that the lower court erred in finding (a) that certain studies are essential, as a matter of sound economics, to an analysis of how freight rates, and increases therein, affect the environment; (b) that the Commission did not in fact perform these essential economic studies; and (c) that the Commission failed to give an adequate response to the criticisms of the draft statement made by other agencies and members of the public.

D. The District Court's Findings of Inadequacy Were Amply Supported by the Record, and Should Be Sustained.

Four of the five federal agencies that commented on the Commission's impact statement [56] concluded that it contained insufficient information on the environmental impact of the proposed rate increases to afford a basis

[55] *U. S. Gypsum, supra*, 333 U.S. at 395.

[56] "Prior to making" its impact statement, the Commission was required by statute to "consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved" in the proposed rate increase. NEPA, § 102(2)(C), 42 U.S.C. § 4332(2)(C).

for informed decisionmaking.[57] The fifth federal agency concluded that the statement contained insufficient analysis of alternatives to the proposed action.[58] The issue before this Court is whether the district court "clearly err[ed]" (Fed.R.Civ.P. 52(a)) in accepting the judgment of these five federal agencies, and in finding the impact statement inadequate.

1. *The Comments of Expert Federal Agencies, and the Commission's Failure to Respond*

The Department of Commerce concluded that the Commission's statement was inadequate because it simply gave:

> "the Commission's judgment on the issue [of environmental impact] without in-depth supporting documentation [, which] is insufficient. We suggest, accordingly that the final environmental impact statement give more attention to this issue and less to justifying a contemplated rate-making action [59] * * * "We believe the statement should contain a more rigorous economic analysis. . . ." (A. 579).

Similarly, the Department of the Interior commented that:

> "[T]*he environmental impacts expected are not analyzed.* Hence, instead of an impact appraisal, the

[57] See A. 705-06 (Council on Environmental Quality); A. 707-16 (Environmental Protection Agency); A.702-04 (Department of the Interior); A. 576-79 (Department of Commerce).

[58] See A. 597-607 (General Services Administration). *Compare, e.g., Monroe County, supra*, 472 F.2d at 697-98; *Natural Resources Defense Council* v. *Morton, supra*, 458 F.2d at 835-36.

[59] See the *Christian Science Monitor*, Feb. 28, 1973, p. 12, quotting Rep. John Dingell, a principal sponsor of NEPA, as saying that some agencies "are complying poorly. They decide what they are going to do and then write an environmental impact statement to support the decision. That is not what Congress had in mind."

main thrust of the discussion is the justification of increased rail freight rates. * * *

"*In summary, no meaningful analysis of the impact statement is really yet possible because the environmental impact is not effectively considered.* A suggestion would be to completely restructure the content of the report by incorporating most of the present environmental impact section as the description of the proposed action. A new environmental impact section could then be developed which would actually examine the expected impacts. . . ." (A. 703-04). (Emphasis added.)

The Council on Environmental Quality commented in the same vein that:

"In our letter of October 30, 1972 [A. 556] we pointed out the deficiencies of the Commission's approach to the question of the impact of rate changes on scrap consumption. The deficiencies have not been corrected. For example, the Draft Environmental Impact Statement ignores completely the very important consideration of how freight rates might affect long-run decisions on investment in scrap-intensive facilities, such as electric arc furnaces." (A. 705).

The Environmental Protection Agency commented that:

"[T]he Commission's basic conclusion that the rate increases in question will have no effect on the use of secondary materials and therefore will have no environmental consequences is not adequately substantiated. The Commission's analysis of alternatives to the proposed increases is also judged inadequate. * * *

"The Commission, at the very minimum, should have substantiated the cost basis of the carriers' request for increased revenues from secondary materials. In addition, reasonable alternatives to the proposed action should have been thoroughly analyzed." (A. 708, 712, *passim*).

The Environmental Protection Agency placed the Commission's impact statement in its lowest classification, "Category 3— Inadequate," meaning that:

"EPA believes that the draft impact statement does not adequately assess the environmental impact of the proposed project or action, or that the statement inadequately analyzes reasonably available alternatives." (A. 715).

The General Services Administration complained that the Commission had failed to explore the alternatives of deregulating the rate structure for scrap, and thus introducing "an added element of competitive [downward] pressure on these rates." (A. 604). The GSA agreed with the Commission that it could not implement this alternative on its own authority, but pointed out that:

". . . the Commission does not lack authority to recommend to Congress that such an exemption be added to the statute. In view of the pendency of much broader deregulatory proposals in Congress, with a broad base of opinion behind them, it is not unlikely that such a recommendation by the Commission—which has been one of the leading forces opposing deregulatory proposals heretofore—would carry considerable weight." (A. 605).[60]

The Commission flatly refused to produce any of the further analysis requested by these sister agencies. Its response was limited to a querulous statement that "the governmental interests . . . seek to demonstrate that this Commission should investigate environmental matters and effects more extensively. . . . It is such one-dimensional approaches as these that we are knowingly seeking to avoid." (A. 18).

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[60] Compare *Natural Resources Defense Council* v. *Morton, supra,* 458 F.2d at 835.

Appellants now urge that the lower court clearly erred, on the basis of the entire record, in accepting the view of the Council on Environmental Quality, the Environmental Protection Agency, the Department of the Interior, and the Department of Commerce, not to mention various independent experts,[61] that the Commission's impact statement provided insufficient information for informed decision making. Appellants ask the Court to form a contrary opinion as to the amount of information needed, and to write that opinion into law.

Appellants ask the Court to give uncritical acceptance, for this purpose, to a Commission analysis which the commenting agencies found not only inadequate, but also self-contradictory. The Environmental Protection Agency, for example, pointed out that:

> "The Commission's decision to limit rate increases to 3 percent on all secondary materials except steel[62] was made in contrast to its conclusion that secondary materials 'would continue to move despite the proposed increases.' Yet, the Commission also reasoned that a 'hold down' on rate increases 'should encourage the movement and recycling of commodities.' *To simultaneously maintain that rate increases will not affect the movement of secondary materials and that 'hold-downs' will encourage movement and recycling is an ambivalent position, indicating that rate increases on secondary materials are arbitrary actions. . . .*" (A. 574). (Emphasis added.)

Appellants also ask the Court to accept, for this purpose, conclusions that even the Commission has since modified or abandoned. See pp. 10-13, *supra*.

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[61] *See, e.g.*, A. 633-652.

[62] *See* Gov.J.S., p. 60d.

Finally, appellants ask the Court to overturn or ignore the salutary rule that when sister agencies reject an impact statement as inadequate, the drafting agency must provide "good faith, reasoned analysis in response." *Silva* v. *Lynn, supra*, 482 F.2d at 1285.[63] In the present case the Commission merely summarized the comments received on its draft statement (A. 191-98), denounced the agencies and parties that submitted those comments (A. 18) and re-adopted almost verbatim, as a final impact statement, the same text that the other agencies had found inadequate when they reviewed it as a draft. (Compare A. 9-199 with A. 200-419.) This is the point of the lower court's observation—made much of by appellants—that:

> "Most of the recipients of the [draft] statement responded with extensive critical comments. * * * None of these comments, however, caused the Commission to alter even partially its conclusions or to change the statement's analysis in any noticeable way." 371 F.Supp. at 1302.

The problem is not that the Commission decided, after preparing and considering an adequate environmental impact statement, to authorize a rate increase. The Commission has discretion to do that. The problem is that the Commission would not take the steps needed to produce an adequate impact statement, even after other federal agencies with environmental expertise had determined

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[63] See *Lathan* v. *Volpe*, 350 F.Supp. 262, 265 (W.D. Wash. 1972): "The proper response to comments which are both relevant and reasonable is to either conduct the research necessary to provide satisfactory answers, or to refer to those places in the impact statement which provide them. *If the final impact statement fails substantially to do so, it will not meet the minimal statutory requirements.*" (Emphasis added.)

See also: *Citizens for Clean Air, Inc.* v. *Corps of Engineers*, 349 F.Supp. 696, 707 (S.D.N.Y. 1972); *Brooks* v. *Volpe*, 350 F.Supp. 269, 278 (W.D. Wash 1972); *cf. South Terminal Corp.* v. *Environmental Protection Agency*, 504 F.2d 646, 665 (1st Cir. 1974).

the Commission's draft statement to be inadequate. The Commission refused to produce "good faith, reasoned analysis in response." And the lower court properly so found.

2. *Failure to provide quantitative analysis*

A principal defect of the Commission's impact statement was its failure, in the words of the lower court, to provide "a quantitative . . . economic study . . . on the responsiveness of the demand for secondary materials to changes in transportation costs." 371 F.Supp. at 1302. (Emphasis added.)

The basis of the Commission's ultimate conclusion that the proposed rate increase would have no adverse environmental impact—despite the *positive* environmental impact which the Commission claimed for its holddown of rates on non-ferrous scrap [64]—was a series of essays on various recycling industries. In each of these essays the Commission described difficulties (other than the rate structure) which inhibit the use of a recyclable commodity, and listed various factors which "may" justify differential rates for the recyclable commodity and the competing virgin material. Each discussion ended with a conclusory assertion that the impact of the proposed freight rate increases would be "minimal," (A. 126, 131); that the rate increase would affect "only a fraction of the . . . market," (A. 116); that the increase would "not have a significant adverse effect upon the environment," (A. 97) or that "there is no evidence sufficient to prove the case for or against the proposed increase on environmental grounds." (A. 104). (*See also* A. 69-70, 135, 138.) No attempt was made to quantify the expected impact, to define "minimal" or "significant" for these purposes, or to present any basis for the conclusion except to recite other factors which also affect the use of recyclables.

[64] Gov.J.S., p. 60d.

A reader of the statement, who does not know whether his own definitions of "minimal" or "insignificant" parallel those of the Commission,[65] is at a total loss to draw any conclusions from the statement—except for the obvious one that the Commission decided that other factors outweighed the environmental considerations.

Analytically, the claim that an environmental impact is "insubstantial" must be grounded on two propositions: First, that any impact less than "x" is insubstantial; second, that the impact in this particular case is less than "x." But as long as the reader of the impact statement is not told the value of "x," or why the Commission concluded that the impact would be less than "x," the document is useless to him.

As the Environmental Protection Agency pointed out (A. 574), the reader's puzzlement is deepened by the Commission's discussion of its "holddown" for non-ferrous scrap. The Commission's simultaneous assertions (a) that the holddown would "encourage" movement of scrap (Gov. J.S., p. 60d), but (b) that the three percent rate increase reflected in the holddown would not "significantly" retard the movement of this scrap (A. 139), give the reader no clue as to what the Commission has concluded. To what extent is movement comparatively encouraged by an increase of 3 rather than 4.1 percent? To what extent is it comparatively discouraged by an increase of 3 percent rather than no increase at all? The reader is not told.

This point is not merely academic. The Commission has discretion to approve a rate increase on recyclables, even where thorough examination discloses environmental costs. But it does not have the authority to waive or shortcut this thorough examination.[66] Nor does the Commission

[65] *See, e.g.*, pp. 11-12, n. 18, *supra*.

[66] See, *e.g.*, *Calvert Cliffs'*, *supra*, 449 F.2d at 1115.

always have the last word as to rail rates. That last word is reserved for the President and Congress, and, ultimately, for the electorate. Thus in *Natural Resources Defense Council* v. *Morton*, 458 F.2d 827, 835 (D.C.Cir. 1972), the court held that:

> "The impact statement is *not only for the exposition of the thinking of the agency, but also for the guidance of these ultimate decision-makers, and must provide them with the environmental effects of both the proposal and the alternatives*, for their consideration along with the various other elements of the public interest." (Emphasis added.)[67]

The degree of quantification needed to apprise "these ultimate decision-makers" of "the environmental effects of . . . the proposal" must obviously vary with the factual circumstances of each case. Here, other federal agencies with environmental expertise overwhelmingly demanded greater quantification and explanation from the Commission.

This is why the lower court found the impact statement inadequate for lack of any "price sensitivity studies." 371 F.Supp. at 1303. In so finding, the lower court did not seek to impose any particular methodology on the Commission—nor did any of the commenting agencies. The term "price sensitivity study" is not, as appellants suggest here, a rigid term of art. A price sensitivity study could employ any of a number of valid techniques. It requires only that the Commission attempt to quantify the relationship between rail rates (prices) and greater or lesser use of scrap.

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[67] *Accord, e.g.*: *Committee for Nuclear Responsibility, supra*, 463 F.2d at 787; *Environmental Defense Fund* v. *Corps of Engineers, supra*, 492 F.2d at 1136; *Calvert Cliffs', supra*, 449 F.2d at 1114.

a. *The impact statement in Ex Parte 295*

Such quantification is by no means impossible. After the order of the court below, the Commision demonstrated its capacity to produce such data. On November 5, 1974, the Commission filed its final impact statement in *Ex Parte 295*, a subsequent general revenue proceeding. This statement implicitly conceded the validity of many of the major criticisms of the Commission's impact statement in *Ex Parte 281*, admitting for example, that the Commission's sole gesture toward quantification in *Ex Parte 281*, an historical comparison of freight rates and scrap movements, was "unfair as well as imprecise" (p. 7-4),[68] and that quantification is needed in describing the environmental impact of rail rates, because:

> "Conclusion as to what is or is not significant is a judgment reflecting the standard of reference used. . . . (p. 3-3)
>
> • • • •
>
> "It is recognized that the question of the significance of any given level of change is necessarily judgmental, reflecting a particular frame of reference and ultimately a standard of values. (p. 7-36)

The *Ex Parte 295* impact statement therefore included price sensitivity studies as to metal scrap and textile wastes, and reached *quantitative* conclusions as to the

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[68] See also the Environmental Protection Agency's criticism of this historical comparison:

> "The crux of the Commission's 'no impact' conclusion . . . was that the movement and use of secondary materials would not be curtailed by the rate increases. The main supporting evidence it presented was that, notwithstanding past increases in freight rates, secondary commodities have continued to move, in some cases in increasing volumes. The fallacy in this reasoning is that many factors other than freight rates affect the price and movement of these commodities; *one cannot look at the aggregate of all those variables and conclude that one of them apparently had no effect.*" (A. 573) (Emphasis added.)

impact of a general revenue increase upon the movement of those recyclables (pp. xiii-xv). It contained, as well, a point-by-point response to the comments of other federal agencies and interested parties (pp. 7-1—7-39), and admitted that the mere fact that other factors also affect the degree to which recyclables are used does not establish that an increase in freight rates has no effect (pp. 2-28).

The Commission, for reasons best known to itself, did not return to the lower court with an offer to apply the type of analysis used in *Ex Parte 295* to the issues in *Ex Parte 281*. It is difficult to contend, in light of *Ex Parte 295*, that the Commission was unable to satisfy the lower court's requirement for quantification in the context of a general revenue proceeding. *Ex Parte 295* was just such a general revenue proceeding. And it is *impossible* to contend, in light of *Ex Parte 295*, that the Commission has any reasoned policy against the use of "price sensitivity studies." In *Ex Parte 295*, the Commission came to tacit agreement with the lower court that such studies are not only appropriate, but, indeed, necessary.

3. *Failure to consider the underlying rate structure*

The lower court also found the Commission's impact statement inadequate on the ground that:

> "We fail to understand how any consideration of the environmental impact of approving the recyclable rate increases could be full without an analysis of how the underlying rate structure itself affects the environment. It is the underlying rate structure which the percentage increases aggravate; if this structure contributes to the degradation of our environment, then the increases would at least presumptively aggravate that contribution." 371 F. Supp. at 1304.

Not even the Commission contends that, as a matter of sound economic analysis, the environmental effects of the present revenue order can be determined without examining the environmental effects of the underlying rate structure. The Commission has acknowledged, in its impact statement in *Ex Parte 295*, that the long-term effect of a percentage rate increase is "to perpetuate and increase any inequities that may exist . . . between primary and secondary commodities," and that such an effect "applies particularly to waste paper and non-ferrous metals for which the . . . Commission has computed differentials in favor of primary materials." (pp. xv-xvi)[69]

The impact statement in *Ex Parte 295* also asserts that:

> "The broader question regarding what the impact of any future general rate increases may have in regard to investment decisions is part of the larger issue of whether or not freight rates are discriminatory." (p. 7-11)

Thus, the rate structure may influence ongoing decisions which will determine the structure of various industries for years to come. The Commission, moreover, admits here that it "is well aware of the need for a thorough study of the basic railroad freight structure. . . ." (Gov. J.S., p. 14). But the Commission does not claim that the present impact statement contains such a study. The Commission's only claim for this statement is that it "examined the evidence [of underlying discrimination] on a preliminary basis." (Gov.Br. p. 44).

This "preliminary" discussion consists principally of a long, elaborate demonstration that differences in per-ton-mile freight rates do not, as such, constitute illegal discrimination under the Interstate Commerce Act. This essay lists various factors which "may" (*see* A. 41,

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[69] *See also* pp. 7-18; 7-25.

42, 91, 113, 138, 144, 154) legally justify rate differentials.

This dissertation is essentially irrelevant to the actual questions which NEPA requires the Commission to address, namely, (a) the actual environmental impact of the proposed rate increases in view of the underlying structure, and (b) the impact and feasibility of "alternatives to the proposed action." It is a *non sequitur* to suggest, as the Commission does, that if an existing or proposed rate "may" be nondiscriminatory in a *legal* sense under the Interstate Commerce Act, it therefore has no *practical* impact, pro or con, on the shipment of recyclables. This section of the impact statement reveals that the Commission considers such a multiplicity of factors as relevant to ratemaking,[70] (factors which the Commission apparently does not subject to any formula for determining their precise impact on individual rates) that the Commission could, if it liked, justify any number of different rate structures as just and reasonable under the Interstate Commerce Act—different rate structures which could have markedly different environmental impacts.

The practical importance of analyzing the underlying rate structure in the context of a general revenue order is highlighted by statements which the Commission made in its *Ex Parte 295* impact statement. In that impact statement, the Commission considered the alternative of raising freight rates selectively for certain items which do not, under the existing structure, pay their own variable costs, so that their transportation must be subsidized by rates charged on other commodities.

The *Ex Parte 295* impact statement concluded that "for specified classes of commodities, deficit operations . . . can be estimated as totalling over $600 million; unclassified

[70] *See* A. 29.

freight rate shipments accounted for additional deficits exceeding $520 million," (pp. 6-2—6-3) and that:

> "Principal commodities resulting in deficit operations . . . [included] metallic ores . . . and forest products. . . . The last named category—primary wood materials—provided the largest deficit contributions. . . . It is significant that except for small amounts of scrap paper carried within the Northeast . . . *no secondary commodities were reported as transported under conditions such that variable costs exceeded revenue.* On the other hand, the deficits involved in transporting some ores . . . totaled about $13,000,000." (Emphasis added.)

The Commission's acknowledgment that the freight rates for many primary products do not even cover their variable costs makes analysis of the underlying rate structure essential to consideration of one of the principal alternatives available in a general revenue proceeding. In reply to the suggestion that rates for virgin materials be increased in relation to rates for recyclables, the *Ex Parte 295* impact statement concluded that this alternative raises an issue of:

> ". . . whether it is advisable to raise rates charged for one broad class of commodities which are now being carried above cost and whose movement should be encouraged on environmental grounds, rather than seeking an equivalent increase in revenue from selectively raising rates on commodities not now meeting variable costs." (p. 6-4)

The Commission then acknowledged that raising rates on primary products which do not meet their variable costs—instead of raising rates on recyclables—is a:

> ". . . *feasible alternative* and . . . is viewed as an inseparable part of the overall rate study regarding an equitable structure." (p. 7-38) (Emphasis added.)

Yet, in *Ex Parte 281*, the present proceeding, the Commission answered a similar suggestion, advanced by appellees Environmental Defense Fund, *et al.*, as follows:

> "Finally, EDF, *et al.*, request that we raise the rates on primary commodities because, it is asserted, the transportation charges for hauling primary commodities do not pay the variable costs of the railroads. In the first place, the rates on primary commodities have already been found to be just, reasonable, and lawful; and we, therefore, would have no lawful or statutory basis for raising such rates. Were we arbitrarily to require that such rates be increased without finding them not to be just, reasonable, and lawful—and the railroads were to lose traffic and become unprofitable as a result—then such action might be found to constitute an unconstitutional taking of property without due process of law.[71] Secondly, the Congress has established tax incentives to promote the discovery and utilization of certain primary commodities. For us to take action which would inhibit the movement of those commodities would be inconsistent with one of our national policies established by the Congress and would, therefore, be equally improper." (A. 156).

This gross inconsistency illustrates the consequences of ruling out any consideration of the underlying rate structure in *Ex Parte 281*. This limitation made it impossible to discuss an immediately available, highly important

[71] This refrain—that if proposed rate increases are not unjust or unreasonable, the Commission has no power to influence them—echoes throughout the Commission's brief. The answer is supplied by the Commission's action *in this very proceeding*, in "holding down" the rate increase on non-ferrous scrap to 3 percent. In taking this action the Commission made no suggestion, much less a reasoned showing, that a "holddown" to anything other than 3 percent (*e.g.*, 2.5 percent or 3.5 percent) would have resulted in rates unlawful under the Interstate Commerce Act, or in "an unconstitutional taking of property without due process of law." See p. 60, *supra*.

alternative which the Commission later acknowledged as "feasible."

In this litigation, the Commission asks the Court to disregard the wisdom which the Commission acquired belatedly in *Ex Parte 295*, and allow the Commission (a) to close its eyes to data which admittedly show that the underlying structure discriminates in a practical sense, (b) to shut off debate on alternatives which it now confesses to be "feasible," and (c) to rely on methods of analysis which it has since described as "unfair as well as imprecise." Perfect consistency may be too much to demand from an administrative agency; but the self-contradiction achieved by the ICC in this instance has reached a level of comic-opera absurdity. Unfortunately, vital national interests—energy, raw materials, and the environment—are at stake here. Unfortunately, too, it has become clear that the relevant considerations will never be systematically addressed unless judicial pressure, which has already forced such progress as the Commission has made, can be maintained. In short, the ICC's refusal to analyze the environmental impact of the rate increases in *Ex Parte 281*, and the alternatives thereto, is a perfect illustration of the reasons which led Congress to enact NEPA in the first place, and of the reasons which require rigorous judicial enforcement of that Act.

a. *The impact statement in Ex Parte 270 (Sub-Nos. 5 and 6)*

On March 29, 1974, less than two months after the order of the lower court, the Commission published a draft impact statement in *Ex Parte 270*, Sub-Nos. 5 and 6. This impact statement, at least according to the Commision, contains a thorough and adequate study of the underlying rate structure for ferrous scrap, which the Commission characterizes here as "the principal commodity in issue." (Gov.J.S., p. 14). The draft statement was succeeded by a final impact statement, covering the

same subject matter, on June 28, 1974. Again, for reasons best known to itself, the Commission chose not to integrate the results of this study into a revised impact statement in *Ex Parte 281* which might have satisfied the requirements of the lower court. It was this impact statement, in *Ex Parte 270*, to which the CEQ referred in its letter to the Commision of December 2, 1974, complaining of the Commission's "apparent refusal" to integrate already completed studies of the underlying rate structure into its ongoing general revenue proceedings, including the present one. (See pp. 6a-8a, *infra.*)

IV. THIS COURT SHOULD NOT HOLD THAT THE COMMISSION SATISFIED NEPA WITHOUT PRODUCING AN ADEQUATE ENVIRONMENTAL IMPACT STATEMENT.

The Commission's principal argument here is that even if its final impact statement was inadequate as a basis for informed decisionmaking, this Court should nonetheless hold that NEPA has been complied with.

This argument takes two principal forms:

1. The Commission argues that it is impossible, in this or any subsequent general revenue proceeding, to analyze "not only the effects of the general rate increases under consideration, but also the basic rate structure upon which they are predicated." (Gov. J.S., p. 14). It therefore claims to need extraordinary relief from that requirement.

This argument rests upon a fallacy, namely that NEPA, but for this relief, would require the Commission to prepare a completely new and separate analysis of the underlying rate structure in every one of its general revenue proceedings. The Act, of course, imposes no such duty. Section 1500.6(d)(1) of the *CEQ Guidelines* for

preparation of impact statements[72] squarely covers this case with its provision that:

> "* * * In many cases, broad program statements will be required in order to assess . . . environmental impacts that are *generic or common to a series of agency* actions . . . . Subsequent statements on major individual actions will be necessary *where such actions have significant environmental impacts not adequately evaluated in the program statement.*" (Emphasis added.)

In other words, NEPA could be fully satisfied, for purposes of the Commission's general revenue proceedings, by the preparation of a "broad program statement" on the environmental effects of the underlying rate structure and alternatives thereto; by the periodic *updating* of this broad program statement as changing circumstances might require; and by the *adaptation* of this program statement, as updated, to meet the requirements of the Act in particular general revenue proceedings. The necessary adaptation, under § 1500.6(d)(1) of the *CEQ Guidelines*, *supra*, would consist of adding to the preexisting program statement new material on the marginal effects of the revenue order then under consideration. The Commission does not dispute that it is capable of analyzing these marginal effects within the time available in a general revenue proceeding.

Thus, once the Commission prepares an adequate "broad program statement" on the underlying rate structure, NEPA does not impose a particularly heavy burden in individual revenue proceedings. It is unlikely that the

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[72] CEQ, *Guidelines: Preparation of Environmental Impact Statements*, 40 C.F.R. § 1500 (1973). While the *CEQ Guidelines* lack the force of law, they have been held to be an authoritative interpretation of NEPA. *Greene County Planning Board* v. *Federal Power Comm'n*, 455 F.2d 412, 421 (2d Cir. 1972), *cert. den.*, 409 U.S. 849 (1972); *Scientists' Institute for Public Information, supra*, 481 F.2d at 1086-90.

environmental impact of the underlying rate structure will change radically from year to year, or from revenue proceeding to revenue proceeding—unless, of course, the Commission decides to reform its approach to such proceedings in order to comply with its specific statutory mandate to "enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources," NEPA, § 101(b)(6). But even reform would not be a matter of constantly recurring innovation, requiring repeated, wholly new environmental analyses.

In point of fact, the Commission has *already* produced what it claims to be an adequate environmental impact statement on the underlying rate structure for ferrous scrap versus iron ore.

With respect to non-ferrous scrap [73] the Commission has had more than five years, since the effective date of NEPA, in which to prepare the "broad program statement" that will enable it to comply easily and routinely with that Act in its general revenue proceedings. During the first two of those five years, the Commission never prepared an impact statement of any kind on any subject.[74] Almost three of those five years have elapsed since the start of the present litigation. Almost one of those five years has elapsed since the order now appealed from. The Court should look with some skepticism on the Commission's contention here that it still cannot assess the environmental impact of the underlying rate structure for non-ferrous scrap, even at this late date. The Court should bear in mind not only the Commission's prior history of making unsupported statements as a "strategem

[73] The Commission admits that with respect to "waste paper and non-ferrous metals" it "has computed [existing rate] differentials in favor of primary materials." See text at p. 12 n. 19, *supra*.

[74] See p. 9, n. 9, *supra*, and accompanying text.

for avoiding the requirements of NEPA," *SCRAP* v. *United States*, *supra*, 346 F.Supp. at 200, n. 16, but also that the Commission's present claim of impossibility is made in the form of conclusory assertions by appellate counsel, which are not subject to any evidentiary test.[75] *Cf. Overton Park*, *supra*, 401 U.S. at 419; *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168-69 (1962); *Securities and Exch. Comm'n* v. *Chenery Corp.*, 318 U.S. 80, 87 (1943). Had the Commission chosen, instead of coming here, to return to the lower court with evidence that, despite good faith efforts, it still had to limit its consideration of the underlying rate structure to ferrous scrap—the "principal commodity in issue" (Gov.J.S., p. 14), and "the major recycled waste product" (Gov. Br., p. 9)— there is no reason to believe that the lower court would have responded unreasonably. See Fed.R.Civ.P. 60(b)(5), (6). As Judge Wright himself observed in *Scientists' Institute*, *supra*, 481 F.2d at 1092, "the statute [NEPA] must be construed in the light of reason if it is not to demand what is, fairly speaking, not meaningfully possible."

[75] Thus, for example, the Commission asserts here that its "current study of the entire rate structure, Ex Parte 270 . . . was *commenced in 1970* and is still some years from completion." (Gov.Br., p. 45, emphasis added.) That account differs, at least in emphasis, from the one given by the lower court:

> "The Commission argues that an ongoing comprehensive investigation into the railroads' freight rate structure, Ex Parte 270, justifies its failure to consider the environmental impact of the underlying rate structure. That investigation, *having been delayed for several years, finally seems to be commencing* . . . ." 371 F.Supp. at 1305 (emphasis added).

The lower court cited the Commission's notice in the Federal Register instituting its investigation in *Ex Parte 270* Sub-Nos. 5 and 6, which did not appear until October 15, 1973. 38 Fed. Reg. 28596 (see A.717). The point is simply that to the extent the Commission's case turns on such finely nuanced factual issues (*e.g.*, questions about the amount of time required for certain studies or about their feasibility) this Court is not the ideal forum in which to determine the merits of that case.

But instead of seeking this limited relief in the lower court, which could have been carefully tailored to a determination of what constitutes "the fullest . . . possible" [76] compliance with NEPA in the present factual setting, the Commission decided to seek a full-scale confrontation in this Court. In this Court, the Commission argues not only that it cannot feasibly consider the underlying rate structure for *non-ferrous* scrap in its general revenue proceedings—but also that it cannot consider the underlying rate structure for *ferrous* scrap, on which it has *already* prepared a "broad program statement" which it claims to be adequate.

This position is part and parcel of the same obduracy which the Commission has maintained not only toward the lower court and appellees, but also toward the other federal agencies involved, since the outset of this proceeding.[77]

The Court should not lightly reward that obduracy. In Chief Judge Friendly's well-chosen words (written with respect to this same Commission):

> "To permit an agency to ignore its duties under NEPA with impunity . . . would subvert the very purpose of the Act and encourage further administrative laxity in this area . . . . [P]reservation of

[76] NEPA, 42 U.S.C. § 4332; *National Helium, supra*, 486 F.2d at 1001.

[77] See pp. 8-13, *supra*. See also A. 567-68 (letter from CEQ to the Commission, dated Oct. 30, 1972, saying that "wholly apart from the Commission's conclusion concerning the environmental impact of its action in *Ex Parte 281*, we are disturbed by the repeated reference throughout the [Commission's] report [of Oct. 4, 1972] to the Commission's inability . . . to adapt to the requirements of NEPA. If manpower problems are preventing effective implementation of the Act, we would have expected the Commission to be alert to this problem earlier. With almost three years having elapsed since the passage of NEPA, lack of resources no longer appear to us to justify—if they ever did—less than full compliance with the policies and procedures of NEPA . . . .")

> the integrity of NEPA necessitates that the [Interstate Commerce] Commission be required to follow the steps set forth in § 102 . . . ." *City of New York* v. *United States*, 337 F.Supp. 150, 160 (E.D.N.Y. 1972) (three-judge court).

The "integrity of NEPA" is very much in issue here. This case represents the first time that the Court has given plenary consideration to the question of what constitutes an adequate environmental impact statement, and how that adequacy is to be determined. The case will inevitably be looked to by the lower courts and the agencies for broad guidance in interpreting NEPA. Should the Court now hold that the Commission complied with NEPA without considering any part of the underlying rate structure in an impact statement on a general revenue order—*even where such consideration is plainly feasible, as it is for ferrous scrap*—the message to other agencies would be lamentably clear. They would be invited to argue in future cases that whenever environmental analysis of a proposed agency action involved a question which was particularly significant, or even, as a practical matter, particularly embarrassing to the agency, consideration of that question could be deferred while the agency proceeded with its action. No matter how carefully the Court might seek to limit such an invitation, the agencies could not be prevented from testing, and attempting to stretch, those limits. Additionally, there would be an incentive for the agencies to refrain from preparing early, overall environmental analyses, as required by the *CEQ Guidelines*, 40 C.F.R. § 1500.6(d), so that they could later reap the benefits of their foot-dragging, as the Commission seeks to do here. These results would be especially serious because NEPA depends for its effectiveness largely on agency self-policing; [78] only a small handful of the thousands of

[78] See CEQ, *Fifth Annual Report*, pp. 371-413 (1974).

impact statements produced to date have ever become the subject of litigation.

A rule permitting agencies to defer consideration of difficult or embarrassing environmental questions, while action proceeds, would return the agencies to the very situation which led Congress to enact NEPA. Congress made plain that NEPA was intended to cure a situation in which:

> "Environmental problems are only dealt with when they reach crisis proportions. Public desires and aspirations are seldom consulted. Important decisions concerning man's future environment continue to be made in small but steady increments which perpetuate rather than avoid the recognized mistakes of previous decades." S. Rep. No. 91-296, 91st Cong., 1st Sess. 5 (1969).

The legislative history shows that § 102(2)(C) of NEPA was conceived as an "action forcing" device, designed to require agencies to give full consideration to the environmental consequences of their proposed activities. Without such an "action forcing" mechanism, it was feared, NEPA would amount to "lofty declarations [and] nothing more than that."[79] To the extent that NEPA "forces" consideration of environmental factors, it does so by requiring that such consideration *precede* substantive agency action.[80] Section 102(2)(C)'s "action

[79] *Hearings on S.1075, S.237 and S.1752 Before the Committee on Interior and Insular Affairs, United States Senate*, 91st Cong., 1st Sess. 116 (1969), (remarks of Sen. Jackson). *Hearings on S.1075, S.237 and S.1752, id.*, at 112-122; S.Rep. No. 91-296, 91st Cong., 1st Sess. (1969); Conf. Rep. No. 91-765, 91st Cong., 1st Sess. (1969); 115 Cong.Rec. 19009-11, 29087, 39701-04, 40415-27, 40923-28 (1969). Hanks and Hanks, *An Environmental Bill of Rights*, 24 Rutgers L.Rev. 231, 251-65 (1970). *See also Calvert Cliffs'*, *supra*, which exhaustively discusses the legislative history of NEPA.

[80] *See, e.g., Wyoming Outdoor Coordinating Council* v. *Butz*, 484 F.2d 1244, 1249-50 (10th Cir. 1973); *Silva* v. *Romney*, 473 F.2d

forcing" mechanism would dissolve if environmental considerations could be postponed to a study which could be completed at the agency's leisure, while the substantive action went ahead.

Moreover, if this Court were to hold that the Commission need not comply with NEPA "to the fullest extent possible" in this proceeding, the result would be to cast grave doubt on a large and sound body of case law developed in the lower courts over the five years since NEPA's enactment. The clear import of this case law is that NEPA requires strict compliance with its procedures, and that mere administrative inconvenience—such as that claimed here—does not excuse noncompliance.[81]

This is not the kind of "hard case" which might justify the creation of bad law. The Commission is now under a declaratory judgment that its present final impact statement in *Ex Parte 281* is inadequate. While the court below directed the Commission to reconsider the rate increases authorized in *Ex Parte 281* in an adequate statement, and to hold a hearing thereon, no sanctions of any practical consequence attach to that direction. The court granted no injunctive relief, and the increased rates approved by the Commission are still being collected by the railroads.

Moreover, this case could not be disposed of simply by holding for the Commission on the need to consider the underlying rate structure in a general revenue proceeding. The Court would still have to deal with the other fundamental inadequacies in the Commission's im-

287 (1st Cir. 1973); *Davis* v. *Morton*, 469 F.2d 593 (10th Cir. 1972); *Scherr* v. *Volpe*, 466 F.2d 1027 (7th Cir. 1972); *Lathan* v. *Volpe*, 455 F.2d 1111, 1121 (9th Cir. 1971); *Calvert Cliffs'*, *supra*, 449 F.2d at 1128-29; *Stop H-3 Ass'n* v. *Volpe*, 353 F.Supp. 14, 17 (D.Hawaii 1972).

[81] *See, e.g.*, cases collected n. 80, *supra*.

pact statement, and with the Commission's subversion of the interagency consultation requirement of § 102(2)(C). Were the Court to hold the Commission in compliance with NEPA on the present set of facts, all agencies would be on notice that the impact statement requirement of § 102(2)(C) was a mere formality, and that adverse comments could be disregarded with impunity, without the barest effort at a reasoned response.

Sacrifice of the integrity of this statute, on which Congress plainly placed the highest hopes,[52] is far too great a price to pay to extricate the Commission and the Railroads from a situation which causes them no identified practical harm, and which, in any event, is of the Commission's own making.

2. The Commission claims that § 102(2)(C) was satisfied here because, quite apart from the adequacy or inadequacy of the Commission's final impact statement, "environmental considerations pervaded Ex Parte 281." (Gov.Br., pp. 24-26.) This is essentially the same claim of "substantial compliance" which the Seventh Circuit considered and rejected in *Scherr* v. *Volpe*, 466 F.2d 1027 (7th Cir. 1972). In *Scherr*, defendants urged that even in the absence of an adequate final impact statement, "NEPA has been complied with . . . because environmental considerations were expressly taken into account. . . ." *Id.* at 1033. The court gave short shrift to this attempt to make compliance with § 102(2)(C) of NEPA a matter of the agency's subjective mental state, and held, *id.* at 1030, that:

> "Section 102 of NEPA provides that its procedures be implemented and carried out 'to the fullest extent possible.' Thus the somewhat flexible and general guidelines articulated in Section 101 are not to

[52] See the discussion of the legislative history in *Calvert Cliffs'*, *supra*.

> be found in Section 102 . . . . The procedural steps outlined in Section 102 apply notwithstanding considerations of administrative difficulty, delay or economic cost. Calvert Cliffs' Coord. Com. v. United States Atomic Energy Comm'n, 449 F.2d 1109, 1115 (D.C. Cir. 1971)."

Likewise, in *Scientists' Institute for Public Information* v. *Atomic Energy Comm'n*, 481 F.2d 1079 (D.C.Cir. 1973), the court held that NEPA could not be satisfied by an "environmental survey" which failed to meet the specific requirements of § 102(2)(C).

> "To the extent the Commission's 'environmental survey' would not be issued in accordance with NEPA's procedures for preparation and distribution, it is not an adequate substitute for a NEPA statement. These procedural requirements are not dispensable technicalities, but are crucial if the statement is to serve its dual functions of informing Congress, the President, other concerned agencies and the public of the environmental effects of agency action, and of ensuring meaningful consideration of environmental factors at all stages of agency decision making." *Id.* at 1091.

The rule, then, is that compliance with § 102(2)(C), if it is to be found, must be found in an adequate final impact statement, drafted in consultation with other "Federal agenc[ies] which [have] jurisdiction by law or special expertise with respect to any environmental impact involved," according to the specific procedural requirements of § 102(2)(C).[53] Were the rule otherwise,

[53] *See also Environmental Defense Fund* v. *Froehlke*, *supra*, 473 F.2d at 350 ("The Corps argues that despite these omissions its impact statement should be considered sufficient because 'at every step of the way . . . the voices of fish and wildlife interests have been heard. . . .' We disagree."); *Greene County Planning Board* v. *Federal Power Comm'n*, 455 F.2d 412, 421-22 (2d Cir. 1972), *cert. den.*, 409 U.S. 849 (1972); *Committee to Stop Route 7* v. *Volpe*, 346 F.Supp. 731, 738 (D.Conn. 1972); *cf. Chemical Leaman Tank Lines*, *supra*, 368 F.Supp. at 946-49.

there would be no guarantee that a final impact statement would furnish parties outside the agency—including the President and Congress as "ultimate decisionmakers"—with sufficient information for informed decisionmaking. *Scientists' Institute, supra*, 481 F.2d at 1091; *Natural Resources Defense Council* v. *Morton, supra*, 458 F.2d at 833; *Calvert Cliffs' Coord. Comm.* v. *Atomic Energy Comm'n, supra*, 449 F.2d at 1114 (D.C.Cir. 1971).

Moreover, in arguing here that it has substantially complied with NEPA without reference to the adequacy or inadequacy of its final impact statement, the Commission places a serious strain on certain parts of the factual record.[84] To pick three examples:

a. The Commission points, in support of its claim that "environmental considerations pervaded Ex Parte 281," to a "draft environmental impact statement which [it] served on March 6, 1972." (Gov. Br., p. 25.) But the Commission fails to mention the district court's uncontested finding that this cursory, six-page document[85] was "premised on facts [the Commission] knew to be false," *SCRAP* v. *United States, supra*, 346 F.Supp. at 194, or the fact that:

> "[T]he President's Council on Environmental Quality (CEQ) and the Environmental Protection Agency [both] roundly condemned [this] draft statement as insufficient." *Id.*

b. The Commission points, again for the same purpose, to its request on December 21, 1971, that "the *railroads* . . . file an environmental impact statement," a request with which "they complied on January 3, 1972," just two weeks later. (Gov. Br., pp. 24-25; emphasis added.) The Commission fails to mention that this attempted delegation of federal NEPA responsibilities to financially interested applicants for federal action is, at the very least, of questionable legality. See *Greene County Planning Board* v. *Federal Power Comm'n, supra*, 455 F.2d at 420-21, where the Second Circuit expressly held such delegation unlawful on the ground that:

> "The danger of this procedure . . . is the potential, if not likelihood that the applicant's statement will be based upon self-serving assumptions. * * * [A]lternatives might be lost as the applicant's statement tended to produce a *status quo* syndrome."[86]

In any event, the Commission makes no claim here that the statement thus produced by the Railroads was adequate in terms of its contents to satisfy NEPA, or even that it materially aided in analysis of the issues. The Commission claims only that "all were entitled to comment." (Gov. Br., p. 25).

c. The Commission points, once more for the purpose of demonstrating that "environmental considerations pervaded Ex Parte 281," to its publication in March, 1973, of "a comprehensive bibliography of literature bearing on the environmental effects of rate increases," (Gov. Br., p. 26). But it fails to mention the unchallenged comment of the Department of Commerce that while this was:

> "an excellent and timely bibliography . . . , [t]he candid reader cannot help but contrast this list with the dated references cited throughout the text of the [accompanying] draft [impact] statement . . . [of which] many date back 3-4 decades. The textbook references [in the draft impact statement]

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[84] *Compare* p. 9, n. 9, *supra*, and p. 67, n. 75, *supra*.

[85] Compare *Monroe County, supra*, 472 F.2d at 697-98.

[86] *See I-291 Why? Ass'n* v. *Burns*, 372 F.Supp. 223, 243-46 (D. Conn. 1974); *Conservation Society of Southern Vermont* v. *Sec'y of Transportation*, 362 F.Supp. 627, 630-31 (D.Vt. 1973), *aff'd*, 7 ERC 1236 (2d Cir. 1974); *Committee to Stop Route 7* v. *Volpe, supra*, 346 F.Supp. at 741.

> . . . are equally dated in terms of the national environmental, energy, and raw material concerns of the past five years." (A. 579).

The Commission's substantial compliance argument, then, comes down to a claim that while one plainly inadequate attempt to comply may not satisfy NEPA, several successive inadequate attempts *will* satisfy that Act, because they demonstrate by sheer number, weight, or volume that "environmental considerations [were] perva[sive]." The Commission stops just short of claiming that, having failed more than once to comply with NEPA, it is now judgment-proof with respect to an order directing it to do so—and that the persons to whom the Commission owes that duty should therefore cease to press for its performance. But as the Commission demonstrated in *Ex Parte 295* and in *Ex Parte 270*, such a claim would give the Commission's abilities too little credit.

V. THE DISTRICT COURT CORRECTLY HELD THAT THE COMMISSION'S IMPACT STATEMENT WAS REQUIRED TO BE MADE AVAILABLE IN DRAFT FORM PRIOR TO ITS ORAL HEARING IN *EX PARTE 281*.

The issues raised by the Commission's failure to release its draft impact statement (A.200) prior to its oral hearing in *Ex Parte 281* are relatively simple and straightforward.

1. NEPA itself does not require that an oral hearing be held on proposed agency action. It requires only that where such a hearing *is* held, an impact statement be made available prior to the hearing, *i.e.*, that the statement "accompany the proposal through the existing agency review processes." [87] NEPA, § 102(2)(C). The *CEQ*

[87] The Commission's brief (p. 47) to the contrary, there is no basis for reading the statutory term "the proposal" as referring only to proposals *originating within* a federal agency. A large proportion of the "proposals" on which impact statements are required originate (as here) with applicants for federal action. *See, e.g., Greene County, supra; Lathan* v. *Brinegar, supra.*

Guidelines, which the courts have recognized as an authoritative gloss on NEPA,[88] require in more explicit terms that:

> "To the fullest extent possible, all . . . hearings [on proposed agency action] shall include consideration of the environmental aspects of the proposed action. * * * Agencies should make any draft environmental [impact] statements to be issued available to the public at least fifteen (15) days prior to the time of such hearings." 40 C.F.R. § 1500.7(d).

2. It is not contested that the "existing agency review processes" in *Ex Parte 281* included an oral hearing. This oral hearing was held on June 15 and 16, 1972. Nor is it contested that the Commission failed to produce its draft impact statement until March, 1973, nine months after that hearing.

3. The district court found as a factual matter not only that an oral hearing was held in *Ex Parte 281*, but that such oral hearings are "customarily" held in the Commission's general revenue proceedings, 371 F.Supp. at 1301, 1307. On this basis, the oral hearing in *Ex Parte 281* was not only part of the "existing agency review processes," (NEPA § 102(2)(C); emphasis added), but also part of the "customar[y]" agency review processes. The Commission now disputes this factual finding as to what is customary, solely on the basis that in two general revenue proceedings *subsequent* to *Ex Parte 281*, no oral hearings were held. The Commission points to no general

[88] See cases cited, n. 65, n. 72, *supra*.

revenue proceeding *prior* to or including *Ex Parte 281* in which an oral hearing was dispensed with.[89]

4. The real issue as to an oral hearing is *not* whether the lower court was correct in holding that the Commission was required in *Ex Parte 281* to produce its draft impact statement prior to the hearing. The court plainly was correct on that point. The real issue is one as to appropriate relief, namely whether, a year after the lower court's order, the Commission should be required to hold another oral hearing in *Ex Parte 281* on issues that may (*or may not*) have been rendered academic by the passage of time and by intervening events. It is that issue to which we next turn in the concluding section of this brief.

VI. IF THIS COURT REACHES THE MERITS, IT SHOULD AFFIRM THE JUDGMENT OF THE LOWER COURT.

While this case may not be moot in the technical sense, its connection with the real world is tenuous, and likely to become more so.[90] The sole effect of the lower court's order was to deprive the Railroads of an argument they *might* make in administrative proceedings which *might* occur, but never *have* occurred. The likelihood that such proceedings *will* ever occur, or that the Railroads will suffer any practical harm as a result of their inability to

[89] The Commission urges that oral hearings have been frequently dispensed with in *other* types of proceedings held under § 15(7) of the Interstate Commerce Act, 49 U.S.C. § 15(7), but does not explain why these other types of proceedings are relevant to the issue of customary practice in general revenue proceedings. (Gov. Br., p. 50, n. 20.)

[90] Had this case arrived here by the certiorari route, it would plainly be appropriate to dismiss the writ of certiorari as improvidently granted. *See, e.g., McClanahan* v. *Morauer & Hartzell, Inc.*, 404 U.S. 16 (1971); *Benz* v. *New York State Thruway Auth.*, 369 U.S. 147 (1962).

make that argument, has obviously diminished with the passage of time, and with the Commission's approval of subsequent general revenue orders. A lot of water has passed under the bridge in the year since the lower court's order.

The one interest at stake here which is still more than academic is what Chief Judge Friendly has called the "integrity of NEPA." *City of New York, supra*, 337 F. Supp. at 160. This Court runs the risk that in reaching out to decide the academic questions presented here, it will inadvertently decide issues which are of great importance elsewhere, on the basis of a highly unusual factual record which affords little insight into the interests which may there be at stake. Any holding here that the Commission has satisfied NEPA would have powerful repercussions in instances which bear little resemblance to the present one, and which deserve to be considered on their own merits, or at least on the basis of a more representative case. These repercussions would affect not only the relatively few cases where litigation has occurred under NEPA, but also the far greater number of cases where the question is how seriously the agencies will take that statute.

The Commission and the Railroads have not demonstrated any actual harm to themselves arising out of the lower court's judgment. Had they wished to petition the lower court for a modification of its judgment in light of changed circumstances, newly performed studies, or any other considerations, they could have done so at any time during the past year, and they could still do so today. Fed.R.Civ.P. 60(b) (5), (6). Indeed their failure to do so in light of the impact statements in *Ex Parte 295* and *Ex Parte 270* is one of the abiding mysteries of the case. Likewise, appellants could still return to the lower court tomorrow if this Court now affirmed the judgment of that court. And there is no basis for assuming that the lower

court—which is far better equipped than this Court to evaluate claims of changed factual circumstances—would respond unreasonably to whatever they might show.

In sum, if this Court reaches the merits, the district court should be affirmed. The district court's judgment was clearly correct, and no showing has been made that the district court, in deciding the case correctly, caused appellants any practical injury which demands extraordinary relief.

CONCLUSION

These appeals should be dismissed for want of jurisdiction under 28 U.S.C. § 1253. Alternatively, the judgment of the lower court should be affirmed.

Respectfully submitted,

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February, 1975

APPENDIX

28 U.S.C. § 1253 provides:

> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

Chapter 157 of Title 28 (§§ 2321-25) provided, prior to its amendment by P.L. 93-584 (Jan. 2, 1975):

> "§ 2321. The procedure in the district courts in actions to enforce, suspend, enjoin, annul or set aside in whole or in part any order of the Interstate Commerce Commission other than for the payment of money or the collection of fines, penalties and forfeitures, shall be as provided in this chapter.
>
> "The orders, writs, and process of the district courts may, in the cases specified in this section and in the cases and proceedings under sections 20, 23, and 43 of Title 49, run, be served, and be returnable anywhere in the United States.
>
> "§ 2322. All actions specified in section 2321 of this title shall be brought by or against the United States.
>
> "§ 2323. The Attorney General shall represent the Government in the actions specified in section 2321 of this title and in actions under sections 20, 23, and 43 of Title 49, in the district courts, and in the Supreme Court of the United States upon appeal from the district courts.
>
> "The Interstate Commerce Commission and any party or parties in interest to the proceeding before

the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party.

"Communities, associations, corporations, firms, and individuals interested in the controversy or question before the Commission, or in any action commenced under the aforesaid sections may intervene in said action at any time after commencement thereof.

"The Attorney General shall not dispose of or discontinue said action or proceeding over the objection of such party or intervenor, who may prosecute, defend, or continue said action or proceeding unaffected by the action or nonaction of the Attorney General therein.

"§2324. The pendency of an action to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall not of itself stay or suspend the operation of the order, but the court may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the action.

"§ 2325. An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

Public Law 93-584 (Jan. 2, 1975) provides in relevant part:

"Sec. 5. Section 2321 of title 28, United States Code, is amended to read:

'§ 2321. Judicial review of Commission's orders and decisions; procedure generally; process

'(a) Except as otherwise provided by an Act of Congress, a proceeding to enjoin or suspend, in whole or in part, a rule, regulation, or order of the Interstate Commerce Commission shall be brought in the court of appeals as provided by and in the manner prescribed in chapter 158 of this title.'

* * * *

"Sec. 7. Sections 2324 and 2325 of title 28, United States Code, are hereby repealed.

* * * *

"Sec. 10. This Act shall not apply to any action commenced on or before the last day of the first month beginning after the date of enactment. However, actions to enjoin or suspend orders of the Interstate Commerce Commission which are pending when this Act becomes effective shall not be affected thereby, but shall proceed to final disposition under the law existing on the date they were commenced."

Section 102 of the National Environmental Policy Act, 42 U.S.C. § 4332, provides in relevant part:

"The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality * * *, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and

shall accompany the proposal through the existing agency review processes;

(D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources[.]"

EXECUTIVE OFFICE OF THE PRESIDENT

COUNCIL ON ENVIRONMENTAL QUALITY
722 Jackson Place, N.W.
Washington, D.C. 20006

December 2, 1974

Dear Fritz:

Since my letter to you of November 6, 1974, the Council on Environmental Quality staff has had an opportunity to review more thoroughly your final impact statement prepared in connection with Ex Parte No. 295 (Sub-No. 1). This statement represents a substantial improvement over your earlier statements on the environmental effects of increased freight rates on recyclable materials. The statement displays a sharper focus on the key issues, and the Commission is to be commended on the progress made.

A comparison of the impact statement for Ex Parte No. 295 (Sub No. 1) with the impact statement prepared for Ex Parte No. 281 clearly shows the improvement which has so far occurred. However, neither of these statements contain an analysis of the underlying freight rate structure. The Commission has recently demonstrated its ability to develop this type of analysis in its final impact statement for Ex Parte No. 270 (Sub-No. 5) *Investigation of Railroad Freight Rate Structure—Iron Ores* and Ex Parte No. 270 (Sub-No. 6) *Investigation of Railroad Freight Rate Structure—Scrap Iron and Steel.* And henceforth, it should be a relatively simple matter for the Commission to update these analyses, and use them in connection with future rate increase proposals being investigated by the Commission. We are concerned, however, over the apparent refusal by the Commission to use these analyses in rate increase proceedings which are still ongoing, such as Ex Parte No. 281, and thus the continuing delay in applying an analysis of the underlying rate structure to the Commission's revenue proceedings.

During the first few years after adoption of the National Environmental Policy Act, it was perhaps inevitable that agencies would focus their environmental efforts on the new proposals that were being generated. The more basic and, in many cases, much more important inquiry into the continuing effects of the programs under an agency's jurisdiction frequently received lower priority. However, the grace period for completing this inquiry has clearly elapsed.

In the case of the ICC, the proceedings in Ex Parte No. 270 have extended, so far, over four years. In that period, a significant number of freight rate increases on recyclable commodities have been approved, involving what were basically across-the-board percentage increases applied to the existing rate structure. These increases have exacerbated any discrimination against recyclables that may exist. Moreover, it is still not clear when the Commission intends to integrate its analysis of the underlying rate structure into its periodic investigations of new, proposed rate increases, and what action might be taken to rectify past decisions made without the benefit of analyses of the underlying rate structure. We wish to affirm the position taken by Mr. Train in his October 30, 1972 letter to Mr. Stafford, and the position taken by Commissioner Brown, that the Commission postpone any rate increases on recycled commodities until Ex Parte No. 270 is concluded.

I would appreciate hearing from you on this matter. As you know, I personally stand ready to assist in any way that I can.

Sincerely,

Gary Widman
General Counsel

Mr. Fritz R. Kahn
General Counsel

Interstate Commerce Commission
12th and Constitution Avenue, N.W.
Washington, D.C. 20423